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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 700.

NATHANIEL D. MOORE; NATHANIEL D. MOORE, JR., SOLE HEIR-AT-LAW OF HELEN MOORE DECEASED, BY HIS GUARDIAN NATHANIEL D. MOORE; AND JOHN McKAY, ADMINISTRATOR OF THE ESTATE OF HELEN MOORE, DECEASED, APPELLANTS,

vs.

CHRISTINA CRAWFORD, MARY ANN MONROE, AND JOHN D. MONROE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 19, 1887.

accession 2881

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INDEX.

	Original.	Print.
Transcript from State court	1	1
Petition for the appointment of next friend	1	1
Consent " " "	1	1
Order appointing Claudius B. Grant next friend	2	1
Bill of complaint	3	2
Answer	8	4
Replication	12	6
Petition for removal	13	7
Bond for removal	15	8
Clerk's certificate	17	9
Stipulation to amend pleadings	19	9
Proposed amendments to the bill of complaint	20	10
Stipulations for depositions	22	11
Complainants' proofs	23	12
Deposition of James H. McDonald	23	12
Deed between Nat. D. Moore & John Monroe, Oct. 18, 1875	31	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 22, 1888.

	Original.	Print
Stipulations as to depositions	33	18
Defendants' proofs	34	19
Deposition of Jane McKay	34	19
John McKay	39	22
James H. McDonald	49	28
Nathaniel D. Moore	58	35
Further proofs of complainants	86	54
Stipulation as to testimony	87	54
Deposition of Wm. D. McIntyre	90	55
Christina Crawford	97	61
Daniel Crawford	114	73
Exhibit B—Note of John Moore to Nat. D. Monroe, Nov. 1, 1875	118	76
C—Certified abstract of title of land in question	118*a*	78
Further proofs of defendants	119	82
Stipulation as to testimony	119	82
Deposition of Wm. D. McIntyre	120	83
Nathaniel D. Moore	127	88
John McKay	129	89
Stipulation as to testimony	131	90
Deposition of William McKay	132	91
Further proofs of complainants	137	93
Stipulation as to testimony	137	93
Deposition of James McIntyre	138	94
Exhibit A—Affidavit of James McIntyre	144	98
Deposition of Margaret Beattie	145	99
Stipulation as to testimony	151	102
Further proofs of defendants	153	103
Deposition of Nathaniel D. Moore	153	103
Notice to produce papers	163	110
Stipulation as to testimony	164	111
Intervening petition of the National Exchange Bank of Milwaukee	169	112
Exhibit A—Agreement between McDonald, McKay, Moore, Ascherman, Gile, Wakefield, McIntyre, and Penokee & Gobebic Development Co., May 25, 1885	179	117
Order on petition of National Exchange Bank	191	123
Complainants' petition	193	124
Exhibit B—Order on petition of National Exchange Bank	204	130
C—Order to show cause and restaining order	205	130
D—Summons and complaint in case of Moore *vs.* National Exchange Bank	206	131
Affidavit of Henry S. Boutell	209	133
Finding by Judge Sage	211	134
Decree	227	142
Petition and allowance of appeal	233	145
Citation	235	145
Proof of service of citation	236	146
Stipulation as to appeal bond, &c	237	146
Bond on appeal	239	147
Clerk's certificate	243	148

1 *Petition for the Appointment of Next Friend, and Consent to Appointment.* (*Filed February 8th*, 1882.)

To the Hon. William D. Williams, circuit judge of the twelfth judicial circuit of the State of Michigan:

The petition of Mary Ann Monroe and John D. Monroe, infants under the age of twenty-one years, to wit, the said Mary Ann of the age of six years and the said John D. of the age of twelve years, respectfully show that a suit is about to be brought in the circuit court for the county of Ontonagon, in chancery, by and on behalf of your petitioners and of Christina Crawford, formerly Monroe, your petitioners' mother, against Nat. B. Moore and Helen Moore, his wife, to compel the conveyance to your petitioners and their mother of an undivided one-sixth part of section sixteen (16), in township forty-seven (47) north, of range forty-six (46) west, in the county of Ontonagon.

Your petitioners therefore pray that Claudius B. Grant, of the county of Houghton, counsellor-at-law, may by your honor's order be appointed the next friend of your petitioners to appear for them as such in the said suit.

And your petitioners will ever pray, etc.

her
MARY ANN x MONROE,
mark.
JOHN D. MONROE.

A. R. GRAY.

I hereby consent to be appointed the next friend of the above petitioners and to appear for them as such in the suit mentioned in the above petition.

Dated February 6th, 1882.

C. B. GRANT.

2 *Order Appointing Claudius B. Grant Next Friend.* (*Filed February 8th*, 1882.)

Before the Honorable William D. Williams, judge of the twelfth judicial district of the State of Michigan.

In the Matter of the Petition of MARY ANN MONROE and JOHN D. MONROE, infants.

On reading the petition of said infants, praying for the appointment of Claudius B. Grant as their next friend in a suit about to be brought in the circuit court for the county of Ontonagon, in chancery, by said infants and by Christina Crawford, formerly Monroe, their mother, as complainants, against Nat. D. Moore and Helen Moore, as defendants, and the written consent of the said Claudius B. Grant to accept said appointment, and the said Claudius B. Grant having personally appeared before me and acknowledged that he

executed the said consent, it is ordered that the said Claudius B. Grant be, and he is hereby, appointed the next friend of the said petitioners to appear for them as such in the suit referred to in said petition.

WM. D. WILLIAMS,
Circuit Judge.

3 In the Circuit Court for the County of Ontonagon. In Chancery.

To said court:

Your oratrixes, Christina Crawford and Mary Ann Monroe, and your orator, John D. Monroe, all residents of Houghton county, Michigan, the last two being minors under the age of twenty-
4 one years, by Claudius B. Grant their next friend, represent unto the court as follows: Your oratrix, Christina, that she is the widow of John Monroe, late of Marquette county, Michigan, deceased, and your oratrix, Mary Ann Monroe, and your orator, John D. Monroe, that they are the only children of said Christina Crawford and the said John Monroe, deceased.

That said John Monroe died on or about the 16th day of August, 1879, intestate, leaving as his sole heirs-at-law the parties complainant hereto aforesaid; that on the 19th day of October, 1875, Nat. D. Moore, of Ashland, in the State of Wisconsin, in consideration of the sum of two hundred and fifty dollars paid to him by the aforesaid John Monroe, made, executed, acknowledged, and delivered to said John Monroe a warranty deed of the undivided one-sixth interest in the northeast quarter of section sixteen (16), in township forty-seven (47) north, of range forty-six (46) west, in the said county of Ontonagon, and in and by said deed, in consideration of the money aforesaid, granted, bargained, sold, remised, released, aliened, and confirmed unto the said John Monroe, his heirs and assigns, forever, one undivided one-sixth of the lands above described, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the same, with the appurtenances, unto the said John Monroe, and to his heirs and assigns forever; and the said Nat. D. Moore therein and thereby covenanted, granted, bargained, and agreed to and with the said John Monroe, his heirs and assigns, that at the time of the ensealing and delivery of said deed he was well seized of the premises therein granted in fee simple, and that they were free from all encumbrances whatever, and that he would, and that his heirs, executors, and assigns should, warrant and defend
5 the same against all lawful claims whatsoever; that the said Nat. D. Moore signed and sealed said deed on the 19th day of October, 1875, in the presence of John Jones and Carl L. Wendel and on the same day duly acknowledged the same before the said Carl L. Wendel, in the county of Marquette, Michigan, the said Wendel being then and there a notary public in and for said county of Marquette, and that on the 20th day of December, 1875, said deed was duly recorded in the register's office of said county of

Ontonagon, in Liber R of Deeds, on pages 105 and 106, as in and by said deed, acknowledgement, and certificate of registration in the possession of complainants, ready to be produced and proved as this court shall direct, and as in and by the record thereof, to which reference is hereby made, will more fully appear; that on or about January 26th, 1875, James H. McDonald and John McKay, then of Houghton county, Michigan, became the owners in fee simple of the whole of the said northeast quarter of sixteen, holding the entire legal title thereto, but holding an undivided one-third thereof in trust for the said Nat. D. Moore by an arrangement between the said McDonald and McKay, on the one side, and the said Moore, on the other, entered into before or at the time the said McDonald and McKay acquired said title; that, in order to carry out said trust and to vest the legal title of an undivided one-third of said lands in said Moore, said McDonald and his wife and said McKay, at what exact time these complainants are ignorant, but some time between January, 1875, and March, 1881, made, executed, acknowledged, and delivered a deed of one undivided one-third part of the said lands to said Moore at his request; that on or about December 16th, 1880, the said McDonald and the said McKay, at the request of the said Moore, conveyed the same undivided one-
6 third part of the said land to Helen Moore, wife of the said Nat. D. Moore, at the request of the said Nat. D. Moore; that the said Helen Moore paid no consideration for said conveyance, and that said interest vested in her as trustee for her husband, Nat. D. Moore, and for the said John Monroe, his heirs and assigns; that on or about the 29th day of January, 1881, Eliza S. McDonald, wife of the said James H. McDonald, and Jane McKay, wife of the said John McKay, by deed duly executed, acknowledged, and delivered, in like manner conveyed their right of dower in aid of the aforedescribed deed of their husbands in and to said undivided one-third of said lands to the said Helen Moore; that said undivided one-sixth interest is worth two hundred dollars and upwards.

These complainants charge on information and belief that the aforesaid deed of an undivided one-third to said Nat. D. Moore has been suppressed or destroyed by the said Nat. D. Moore and by Helen Moore, who are hereby made parties defendant to this bill, and that the deed from said McDonald and McKay and their wives to the said Helen Moore was procured by the said Nat. D. and Helen Moore for the purpose of cutting out complainants' title to the undivided one-sixth of the said land and of depriving them thereof; that said defendants refuse to recognize complainants' said title and deny that complainants have any title.

Considering the premises, complainants pray as follows: That the said Helen Moore be compelled by the proper decree of this court to execute and deliver a good and sufficient warranty deed or deeds of the undivided one-sixth part of said premises to these complainants in the proportions to which they are respectively entitled as sole heirs of said Monroe; that defendants pay the costs of this suit, and for such further or for such other relief as may
7 seem meet and proper; and that a subpœna in the form pre-

scribed by the rules and practice of this court issue to the said defendants, Nat. D. Moore and Helen Moore.

(Signed) CHRISTINA CRAWFORD,
MARY ANN MONROE AND
JOHN D. MONROE,
By CLAUDIUS B. GRANT,
Their Next Friend.

(Signed) CHANDLER & GRANT,
Solicitors for Complainants.

T. L. CHADBOURNE,
Of Counsel.

8 *Answer.*

STATE OF MICHIGAN:

The Circuit Court for the County of Ontonagon. In Chancery.

The joint and several answer of Nathaniel D. Moore (sued as Nat. D. Moore) and Helen Moore, defendants, to the bill of complaint of Christina Crawford and Mary Ann Monroe and John D. Monroe, by their next friend Claudius B. Grant, complainants.

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the said bill of complaint contained, for answer thereunto, or to so much or such parts thereof as they are advised it is material for them to make answer unto, answering, say:

1. They admit that the said Christina Crawford is, or was, the widow of John Monroe, and that the other complainants are his only heirs-at-law, and that said John Monroe died, as set forth in said bill.

2. They admit that about the day stated in said bill the defendant, Nathaniel D. Moore, executed and delivered to the said John Monroe a deed purporting to convey to said John Monroe the land described in said bill, but whether said deed contained the covenants of warranty set forth in said bill they are unable to state and pray that complainants may be held to strict proof thereof.

At the time of making said deed said Nathaniel D. Moore had no title, legal or equitable, to said tract of land or any interest therein, which fact was well known to said John Monroe, but he expected to obtain a conveyance from the owners thereof of
9 the undivided one-third, and said deed was intended to convey one-half of said interest when he could obtain it.

3. Said John Monroe paid upon obtaining said deed only ten dollars, giving his note for two hundred and forty dollars, the remainder of the price agreed upon. Said Nathaniel D. Moore made an effort afterward to obtain a conveyance of said interest, but was unable to obtain it. At the time said John Monroe took said deed he gave said Nathaniel D. Moore one hundred and fifty dollars to enter land for him at U. S. land office, if he should know of any that

was desirable. About six months thereafter said Monroe, knowing that said Nathaniel D. Moore had not yet obtained a title to an interest in said land, told said Nathaniel D. Moore that he did not want an interest in the land, but wanted his note back and his money he had paid, the ten dollars on the land and the one hundred and fifty dollars furnished to enter land, which was still unexpended. Said Nathaniel D. Moore thereupon gave said Monroe his note for $160, and it was agreed that said Monroe should quitclaim to him said land, and he should cause said Monroe's note for $240, which was then in the possession of one John McKay, a friend of them both, to be surrendered to him. Said John Monroe soon after went to Colorado, where he died, not having then executed such quitclaim.

Early in the summer of 1876, and before the death of said Monroe, said complainant, Christina, by the direction of her said husband, applied to said McKay for said note, claiming that said Nathaniel D. Moore had no title to said land, and that there was no consideration for said note. Said McKay, as he had been previously requested by said Nathaniel D. Moore, thereupon delivered said note to said Christina for said Monroe, and the same was canceled, and has never been paid.

10 About a month thereafter said Nathaniel paid to said Monroe the ten dollars he had paid upon said deed, and soon afterward paid the remainder of his said note of one hundred and sixty dollars.

These defendants charge that said Christina well knew that her husband had given up said purchase, and that his money had been refunded as aforesaid, and that the said note for $240, which was so surrendered to her, was the note that was given at the time he got said deed from said Moore, and that said Monroe never paid anything for said land interest, otherwise than as above stated.

4. They admit that James H. MacDonald and John McKay purchased and became the owners in fee simple of said land, but they deny that they held the undivided one-third or any part thereof in trust for said Nathaniel D. Moore, or that there was any arrangement between them whereby said MacDonald and McKay agreed to hold the same in trust for him.

5. They deny that said MacDonald and said MacKay, or either of them, ever executed or delivered to said Nathaniel D. Moore a deed conveying any interest in said land whatever to him, or any writing whatever, giving him any interest, legal or equitable, therein.

6. They admit that about the time stated in said bill said MacDonald and McKay conveyed the undivided one-third of said land to said Helen Moore, as they had a right to do, and she is now the owner of said undivided interest, and they admit that said interest is worth much more than two hundred dollars, but they deny that said one-third interest vested in or has ever been held by said Helen Moore in trust for her said husband or for any one, but in fee simple for her own use and benefit.

7. At the time said Monroe decided to give up said purchase and take back his money and note, as well as when the said note
11 was finally surrendered to said complainant Christina, said

land was of uncertain value, and was not known to be worth more than the sum said Monroe was to pay for it, or at that rate; but since that time and since said money was paid back and said note surrendered, such mineral discoveries have been made thereon as to show that it is worth many times that sum, and it is only since said discoveries, made at the expense of these defendants and said MacDonald and McKay, that these complainants have claimed to have any interest therein.

8. These defendants are advised and allege that said complainants have not in and by their said bill made or stated such a case as entitles them to any relief from this honorable court, and they claim the benefit of a demurrer thereto on that ground.

9. They deny that any matter or thing in said bill of complaint contained that is not herein and hereby well and sufficiently answered, confessed and avoided, traversed or denied, is true to their knowledge or belief, and they pray to be hence dismissed with their reasonable costs by them in this behalf sustained.

(Signed) NATHANIEL D. MOORE.
HELEN MOORE.

BALL & HANSCOM,
Solicitors and of Counsel for Defendants.

12 The Circuit Court for the County of Ontonagon. In Chancery.

The replication of Christina Crawford and Mary Ann Monroe and John D. Monroe, by their next friend, Claudius B. Grant, complainants, to the answer of Nat. D. Moore and Helen Moore, defendants.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

CHANDLER & GRANT,
Solicitors for Complainants.

13 *Petition for Removal to the U. S. Court.* (*Filed Jan.* 24, 1885.)

The Circuit Court for the County of Ontonagon. In Chancery.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

To the honorable the circuit court of the county of Ontonagon, in chancery:

The petition of Nathaniel D. Moore and Helen Moore, defendants above named, respectfully represents to this honorable court that your petitioners, at the time of the commencement of this suit, were and are still citizens of the State of Wisconsin, and the said complainants were and still are citizens of the State of Michigan; that the matter in dispute in said suit, exclusive of costs, exceeds the value of five hundred dollars, and that the same is a controversy between citizens of different States.

Your petitioners make offer and file herewith a bond, with good and sufficient sureties, for their entering into the circuit court of the United States for the western district of Michigan, northern
14 division, in equity, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto, and for doing all other things as by act of Congress are required to be done upon the removal of a suit into the circuit court of the United States.

Your petitioners therefore pray this honorable court to accept this petition and said bond and order the transfer of said suit to said circuit court of the United States for the western district of Michigan, northern division, in equity.

DAN. H. BALL,
Solicitor and of Counsel for said Defendants.

UNITED STATES OF AMERICA, } *ss:*
Western District of Michigan, County of Marquette, }

Dan H. Ball, being duly sworn, says that he is the solicitor for the petitioners named in the foregoing petition and knows the contents thereof, and that the same is true as he verily believes.

DAN. H. BALL.

Subscribed and sworn to before me this twenty-third day of January, A. D. 1885.

RICHARD BLAKE,
Notary Public in and for said County.

15 *Bond on Appeal to the United States Circuit Court.* (*Filed January* 24, 1885.)

Know all men by these presents that we, Dan. H. Ball and David Murray, of the city and county of Marquette, Michigan, are held and firmly bound unto Christina Crawford and Mary Ann Monroe and John D. Monroe in the penal sum of five hundred dollars, for the payment thereof, well and truly to be made unto them, their heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: Nathaniel D. Moore and Helen Moore having petitioned the circuit court for the county of Ontonagon, in chancery, for the removal of a certain cause therein pending. wherein Christina Crawford and John D. Monroe and Mary Ann Monroe, by their next friend, Claudius B. Grant, are complainants, and Nathaniel D. Moore and Helen Moore are defendants, to the circuit court of the United States in and for the western district of Michigan, northern division, in equity:

Now, if the said Nathaniel D. Moore and Helen Moore shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do and cause to be done all other things required by act of Congress to be done upon
16 the removal of a suit into the circuit court of the United States, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals the twenty-third day of January, A. D. 1885.

DAN. H. BALL. [SEAL.]
DAVID MURRAY. [SEAL.]

STATE OF MICHIGAN, } *ss:*
County of Marquette, }

Dan. H. Ball and David Murray, the sureties named in the foregoing obligation, being duly sworn, each deposes and says that he is a resident of the State of Michigan and is worth the sum of one thousand dollars, over all just debts and liabilities, in real estate subject to execution in said county of Marquette.

DAN. H. BALL.
DAVID MURRAY.

Subscribed and sworn to before me this twenty-third day of January, A. D. 1885.

RICHARD BLAKE,
Notary Public in and for said County.

17 & 18 *Certificate of Clerk of Ontonagon County.*

STATE OF MICHIGAN, } ss:
County of Marquette, }

I, Michael A. Powers, clerk of the circuit court for the said county of Ontonagon, do hereby certify that the annexed and foregoing is a full, true, and complete copy of the entire record and proceedings, compared by me from the original record of the suit wherein Christina Crawford and Mary Ann Monroe and John D. Monroe, infants, by Claudius B. Grant, their next friend, are complainants and Nathaniel D. Moore and Helen Moore are defendants, in equity, in which case, while pending in the circuit court for the said county of Ontonagon, in chancery, a petition and bond for the removal of said cause to the circuit court of the United States for the northern division of the western district of Michigan, in equity, was duly filed; that said original records and proceedings now remain in my office, and that the foregoing copy is a full, true, and complete copy of the whole of such original.

I further certify that I did, as such clerk, upon the filing of the aforesaid petition and bond for the removal of said cause, prepare a like full and complete copy of all such original records and proceedings in said cause, and that I caused the same to be duly filed in the said circuit court of the United States for the western district of Michigan, northern division, in equity, duly certified by me.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court, at Ontonagon, in said county, this first day of July, A. D. 1886.

[SEAL.] MICHAEL A. POWERS, *Clerk.*

19 *Stipulation to Amend Pleadings.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

It is hereby stipulated that the complainants shall have leave to amend their bill in this cause in accordance with the proposition hereto annexed, and that on filing this stipulation and said proposed amendments said bill shall be considered amended accordingly; and that all the allegations contained in said amendments shall stand denied by the defendants.

Said defendants shall have leave to amend their answer by striking out, in the third paragraph thereof, after the words "agreed that said Monroe should," the words "quitclaim to him said land," and

inserting in lieu thereof the words "surrender said deed;" and also by striking out, in the same paragraph, after the words "where he died, not having," the words "executed such quitclaim," and inserting in lieu thereof the words "surrendered said deed."

On filing this stipulation said answer shall be considered as amended accordingly, and said amendments may be inserted in the bill on file by erasure and interlineation.

20 In all other respects the pleadings heretofore filed and the issue heretofore joined shall remain unchanged, and all testimony heretofore taken in this cause shall have the same force and effect as if said amendments had been made before the same was taken.

Dated July 23d, 1886.

CHANDLER & GRANT,
Solicitors for Complainants.
T. L. CHADBOURNE,
Of Counsel.
BALL & HANSCOM,
Solicitors for Defendants.

Proposed Amendments to the Bill of Complaint.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Amend the bill by inserting before the words "considering the premises" the following: "These complainants allege and charge that the said conveyances by the said McDonald & McKay and their wives to the said Helen Moore were made at the instigation of said Nat. D. Moore with the intent and purpose of defrauding these

21 complainants out of the estate in fee conveyed and assured and intended to be conveyed and assured to the said John Monroe by the said Nat. D. Moore, as aforesaid, by lodging the apparent legal title in his wife's name, but for his own benefit and use; and they charge that in equity and good conscience that transaction is and ought to be held to be of the same effect as if the said McDonald & McKay and their wives had conveyed said interest directly to the said Nat. D. Moore instead of to his wife; and that the said Moores, husband and wife, ought to be and are estopped by the terms of Moore's said conveyance to Monroe from claiming or asserting that, as to the one-sixth interest in said land conveyed by the said Nat. D. Moore to the said John Monroe, the said Helen Moore has any title or interest therein as against complainant; and they further charge that, as to said one-sixth interest, the title is in them by virtue of the premises; that at the time of said conveyance by

Nat. D. Moore to John Monroe said Moore was unmarried, and that said Helen Moore gave nothing for either or any of said conveyances, nor for said interest in said land, and that she took the same with full notice and knowledge of complainants' rights, obtained as aforesaid, by deed from said Nat. D. Moore to said John Monroe.

22 *Stipulation for Deposition.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE

v.

NATHANIEL D. MOORE and HELEN MOORE.

This cause having been commenced in the circuit court for the county of Ontonagon, in the State of Michigan, in chancery, and the defendants having filed their petition and bond in due form for the removal of the same to this court, the transcript of the record not having been yet filed therein, it is hereby stipulated that the deposition of James H. McDonald and the depositions of John McKay and Jane McKay, heretofore taken in said cause, but not yet filed, may be filed in this court direct; and it is further stipulated that the depositions of James H. McDonald and Nathaniel D. Moore, and any other witnesses that either party may wish to examine, may be taken at any time hereafter on the usual notice, and that all such depositions heretofore taken and hereafter to be taken and filed with the clerk of this court may be read in evidence on the hearing of this cause with the same effect and subject to the same objections as if said cause had been fully removed and the transcript had been duly filed in this court before the taking of said depositions and as if the same had been taken under the authority of and in accordance with the rules of this court.

Dated January 29th, 1885.

CHANDLER & GRANT,
Solicitors for Complainants.
DAN. H. BALL,
Solicitor for Defendants.

23 *Complainants' Proofs.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Ontonagon. In Chancery.

CHRISTINA CRAWFORD *et al.*, Complainants,

v.

NAT. D. MOORE *et al.*, Defendants.

Deposition of James H. McDonald, Taken January 4th, 1883. *Filed July 31st,* 1885.

Deposition of James H. McDonald, a witness produced, sworn, and examined on the 4th day of January, A. D. 1883, at my office, in the city and county of Marquette and State of Michigan, by virtue of a stipulation signed by the respective parties, which stipulation is hereto annexed, said deposition being taken on the part of the complainants in the above entitled cause.

Present: C. B. Grant, solicitor for complainants; Dan H. Ball, solicitor for defendants.

JAMES H. MCDONALD, a witness produced, sworn, and examined on behalf of the complainants, testified as follows:

Direct examination by Mr. GRANT:

Q. Do you know Nat. D. Moore?

A. Yes, sir.

Q. Did you have an agreement with him in regard to an interest in the northeast quarter of section 16, township 47 north, range 46 west?

A. Yes, sir; not particularly any arrangement was made. It was kind of loose when he went out in the woods.

24 Q. The State patent was issued to you and one John McKay, wasn't it? Who located the land?

A. Mr. Moore.

Q. What was the arrangement between you and Mr. McKay and Mr. Moore?

A. Well, the arrangement was that he was to have an interest in it and he would pay me what he owed me. He owed me at the time.

Q. Did you have an arrangement with him—you and Mr. McKay—in regard to deeding him an interest, or his having an interest for locating the land?

A. Well, I can tell the whole circumstances: When he went out, I told him if he could see anything that would make his eye water to let me know. I don't know as I ever spoke to him about an interest, but it was always understood, you know, when a man looked up minutes that he should have an interest in it; so when

he came back he told me to enter such and such land. I don't remember as I said anything about any interest or anything about it, but it was always understood.

Q. Well, what interest was he to have in the land for locating it and giving you the minutes?

A. I could not say.

Q. Wasn't it a one-third interest?

A. I could not say; I believe not; as a general thing it is a quarter; there was nothing ever said about what interest he should have, but he was to have an interest.

Q. Did you and Mr. McKay make out a deed of one-third interest in this land at Hancock, Houghton county, Michigan, to Mr. Moore?

A. No, sir; I think there was something got up, but it was so long ago that I have forgotten all about it, and I forgot it tetotally when he called for the deed.

Q. Was not there a deed made out by Mr. Viele?

25 A. I don't know; I can't remember who made out the deed, but there was a deed partially made out.

Q. Wasn't it signed and executed by you and your wife and Mr. McKay?

A. No, sir; it may have been signed by me, but if I did sign it I don't remember; it is so long ago I forget all about it; I didn't even know until I wrote McKay what interest I was to have, you know.

Q. Let me call your attention to a conversation with me at Escanaba some time last summer; didn't you tell me that the deed was made out and you instructed Mr. Viele not to deliver it because Mr. Moore owed you some money?

A. Yes, sir; that was a fact.

Q. Who signed that deed?

A. If it is signed at all I signed it.

Q. Wasn't it signed by McKay?

A. No, sir.

Q. Wasn't it signed by McKay after you signed it?

A. No, sir; if he did sign it I don't know it, because I turned the deed over to him, and left it there with those instructions.

Q. If it was executed by McKay and his wife afterward it was done by Mr. Viele after you let Mr. Viele have it?

A. Yes, sir; after it had been——

Mr. BALL: Did you say you turned the deed over to Viele and to McKay?

A. I think I gave the deed to McKay; it is so long I have forgotten all about it; either to Viele or to McKay; I think I gave the deed to McKay.

—. Do you know what ever became of that deed?

A. I don't; I never saw it from that time.

Q. Was it for a one-third interest in this land?

A. I could not say; it is either one-third or one-quarter; I don't know which; I wrote to McKay afterward, when they called for the deed the last time, what interest I was to have in that.

Q. You subsequently deeded the same interest, did you, to Mr. Moore's wife?

A. Yes, sir.

26 Q. You received no consideration from her, did you?

A. One dollar.

Q. But it was done on account of your former agreement with Mr. Moore, I suppose?

A. Yes, sir.

Q. Nothing was paid you at the time the deed to Mrs. Moore—no money. Nothing was paid you and McKay at the time of your giving the deed to Mrs. Moore?

A. Yes, sir; one dollar.

Q. That was put in, I suppose, as a mere nominal consideration?

A. Yes, sir; I believe it is lawful to do so.

Q. Do you recollect about what time the deed was made out up at Hancock?

A. Well, sir, I could not say. I have no recollection what the time was.

Mr. BALL: I suppose I should note an objection to the testimony in regard to the contents of that deed. I suppose you expect to prove its loss?

Mr. GRANT: Oh, yes.

Mr. BALL: Note an objection to the contents of the deed, unless it is accounted for.

Q. Your arrangements with Mr. Moore were carried out?

A. Yes, sir.

Q. And after they were carried out you deeded this land in pursuance of that agreement?

A. Yes, sir; well, of course, we gave the title to whoever he said.

Q. He asked you to make out a deed to his wife?

A. Yes, sir.

Q. And you did so?

A. Yes, sir.

Q. You didn't see Mrs. Moore, I suppose?

A. No, sir.

Q. You never had anything to do with Mrs. Moore in regard to the land?

A. No, sir.

27 Cross-examination by Mr. BALL:

Q. When was it that Moore explored this land?

A. It must have been in '75.

Q. You made an arrangement with him as he was going out in the woods looking over land, seeing if he could find anything desirable to enter, did you?

A. I didn't make any arrangement, only just what I told you, if he would see anything that would make his eye water to let me know.

Q. There was no agreement as to interest, then?

A. No; nothing said. I don't know as I ever talked to him about interest.

Q. When he came in and told you to enter the northeast quarter of section 16 what did you do?

A. I gave him the money and he went to Lansing and entered the land.

Q. The land was entered in your name?

A. In my name and McKay's.

Q. When he reported this land to you and you gave him the money to go and locate the land for you and McKay, did you agree to give him any interest?

A. No, sir; not as I remember. I never agreed to give him anything.

Q. Was anything said between you and him that he was to have an interest?

A. It is always understood; there may have been such talk.

Q. Can you recollect any such talk between you and him?

A. No, sir; but he always knew I done what was right, and whatever he done or I done—if I ever spoke to him about any such thing I always done what I agreed with him, so there was no questions asked them.

Q. Did you agree to give him an interest, or did he go and locate it relying on what—that you would do what was right by him?

A. Yes, sir.

Q. Which was it?

28 A. It was relying upon my doing what was right. Of course, he expected an interest.

Q. You expected to give him an interest?

A. Yes, sir.

Q. But, so far as you can recollect, I understand you that you made no agreement to give him any interest?

A. Oh, no; he always owed me, you know, and I was always loaning him money, and when I wrote out this deed and left it with McKay, or whoever I left it with, I told McKay never to sign that deed until I was made right with Moore.

Q. Until he paid you what he owed you?

A. Yes, sir.

Q. When the matter was talked over between you and Moore and you and McKay and Moore was anything ever said between you as to what interest Moore would probably get or expected to get or was to get?

A. I don't recollect, but I have written to McKay at the time this last deed was made out what interest he was to have; McKay will testify to that; I didn't know what interest he was to have, so I wrote McKay.

Q. Were you and McKay together when he reported this land to you and you gave him money to go and enter it?

A. No, sir; I asked McKay afterward if he would take an interest. He didn't pay me the money, neither, McKay didn't; I trusted McKay and waited for the money.

Q. You gave directions to have it entered in that way before you had any bargain with McKay?

A. Yes, sir—that is, I believe I had a talk with McKay before the land was entered, because I wanted to know if he would take an interest in it.

Q. About this particular land, or about any land that Moore would report?

A. About this land.

Q. Now, do you know of McKay's ever having any talk with him about giving him any interest—that is, promising him any interest?

29

A. McKay didn't know anything about it; Moore didn't deal with McKay at all; he told all his prospects to me.

Q. Then all the arrangement that was made or all the talk that was had with Moore about it before the land was purchased from the State and patented was between you and Moore?

A. Yes, sir; between Moore and I; we may have met the evening before we went away and had an understanding about entering the land; I could not recollect anything about it.

Q. But I understand you that no agreement was made between you and Moore and McKay as to interest?

A. No, sir; I don't recollect of any, but it was generally understood; I had it in my mind it was one-quarter.

Q. Then you had it in your mind that a quarter was what?

A. That Moore was entitled to a quarter interest or explorer's right.

Q. Not because you had agreed to give him a quarter, but you thought he was entitled to it by general usage?

A. Yes, sir; I didn't think—I didn't expect he was entitled to a third; I wrote McKay that I made out the deed so and so, but wasn't sure whether he was to have a third or a quarter; I believe them is the words I wrote McKay, but as he has worked so well I thought we ought to give him a third.

Q. You were satisfied to give him a third?

A. Yes; I was satisfied to give him a third.

Q. You say that there was a deed made out up at Hancock to be executed by you and McKay to Moore?

A. I believe I have a faint recollection of some such thing; that there was some kind of a deed I am very sure; I can't say who drawed it out either; I don't remember anything about that; but there was some paper and I left it with McKay; I recollect distinctly telling McKay when I left there never to sign them papers until Moore paid me.

30

Q. Neither to sign it nor to give it to Moore?

A. Yes, sir.

Q. So far as you know, was it ever given to Moore?

A. I never saw the papers from that time; I don't suppose he did.

Q. You are not sure whether he signed it or not?

A. I am not sure, but he must have signed them or else I would

not have left them there, because my name ordinarily would go down first.

Q. By whom was the deed to be signed?

A. It was to be signed by McKay.

Q. Who else—his wife?

A. No; the women had nothing to do with this. It was a private deed betwixt ourselves.

Q. They didn't know anything about it?

A. I dasent tell the women about it, because I thought it was a kind of wild-cat speculation.

Q. Then it wasn't to be signed by your wives at all?

A. I don't think it was.

Q. Do you know John Monroe?

A. Yes, sir.

Q. Did you know of any arrangements between him and Moore by which Moore was to sell his interest in that land?

Mr. GRANT: Objected to as improper cross-examination.

A. Yes; I think there was some traffic between them some way; I could not say how.

Redirect examination by Mr. GRANT:

Q. You say you might have had a talk with him, as I understand you, in regard to his having an interest in the land?

A. Yes, sir.

Q. Had you had prior dealings with him in regard to land in this way—in regard to locating land?

A. No; he was mad at me at the time.

31 Q. Had he ever located any land for you before this?

A. No, sir.

Q. This was the first transaction you had with him, then?

A. Yes; this was the first and the last; he never entered land for me afterward.

Q. And he understood he was to have the usual explorer's rate of interest in the land, as I understand, which you thought was one-quarter?

A. Yes, sir.

Q. You supposed he pointed out these lands or located them with that expectation and understanding at the time?

A. Yes, sir; I have entered land before on the same basis.

J. H. McDONALD.

This indenture, made this eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy-five, between Nat. D. Moore, of the village of Ashland, county of Ashland, State of Wisconsin, of the first part, and John Monroe, of city of Ishpeming, county of Marquette and State of Michigan, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of two hundred and fifty dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, doth by these presents grant,

bargain, sell, remise, release, alien, and confirm unto the said party of the second part and his heirs and assigns forever all that tract of land situate and being in the county of Ontonagon and State of Michigan and described as follows, to wit: One undivided one-sixth interest in the northeast quarter of section sixteen (16), town.
32 forty-seven (47) north, range forty-six (46) west, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part and to his heirs and assigns forever; and the said party of the first part, his heirs, executors, and his administrators, do- covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the above-granted premises in fee simple; that they are free from all incumbrances whatever, and that he will, and his heirs, executors, and administrators shall, warrant and defend the same against all lawful claims whatsoever.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

NAT. D. MOORE. [L. S.]

Sealed and delivered in presence of—
JOHN JONES.
CARL L. WENDEL.

STATE OF MICHIGAN, } *ss:*
County of Marquette, }

On this 19th day of October, in the year one thousand eight hundred and seventy-five, before me, the subscriber, a notary public in and for said county, personally appeared Nat. D. Moore, to me known to be the same person described in and who executed the within instrument, who acknowledged the same to be his free act and deed.

CARL L. WENDEL,
Notary Public.

33 In the Circuit Court for the County of Ontonagon. In Chancery.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

It is hereby stipulated in the above-entitled cause that the testimony of James H. MacDonald may be taken before Silas W. Goodale, stenographer and notary public, and that his deposition when

so taken may be read in evidence upon the trial of said cause, subject to all objections for incompetency and irrelevancy.

Dated January 4th, 1883.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

The annexed deposition not having been certified by S. W. Goodale, and he having gone away from this part of the country, it is hereby stipulated and admitted that said deposition was taken under oath before said Silas W. Goodale, who was then a notary public for Marquette county, Michigan, and that the same may be filed and read in evidence in the circuit court of the United States for
34 the northern division of the western district of Michigan, to which this cause has been transferred, with the same effect as if the same had been duly certified by said Silas W. Goodale; also that the annexed deed and certificates endorsed thereon were duly offered in evidence before said notary.

Dated July 23rd, 1885.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

Defendants' Proofs.

Depositions of Jane McKay and John McKay, taken January 8th, 1885. Filed July 14th, 1885.

Depositions taken before me, the undersigned, clerk of the circuit court for the county of Ashland, in the State of Wisconsin, on the eighth day of January, A. D. 1885, in a certain cause pending in the circuit court for the county of Ontonagon, in the State of Michigan, in chancery, between Christina Crawford, Mary Ann Monroe, and John D. Monroe, complainants, and Nathaniel D. Moore and Helen Moore, defendants, on the part of the defendants.

JANE MCKAY, being by me duly sworn on behalf of the defendants, deposes and says as follows:

35 I reside at Ashland, in the State of Wisconsin. In 1874, 1875, and 1876 I resided at Hancock, Michigan; am the wife of John McKay. I know of my husband and James H. McDonald having purchased of the State a part of section sixteen, supposed to be iron land, in 1874.

Q. Was anything done towards making a deed of an interest in this land to Nathaniel D. Moore?

A. I believe something was done. I couldn't say what year this was, but think it was 1875, but am not certain; it must have been in the summer time. This was in Hancock, Michigan.

Q. Was anything said about your signing the deed?

A. My husband said something to me about it afterward. I did not do so. I refused to sign it; I did not see the paper; I don't know what was done with the paper. I learned that Mr. Moore had given Mr. Monroe a deed of an interest in that land. Mr. Monroe wrote to Mr. McKay. This was the way I learned it.

Q. Did you learn about that time of Mr. Monroe having given a note to apply on the price mentioned in the deed?

A. Not at that time. I learned that when Mr. McKay's brother came to my place in Hancock and had the note. He gave me the note to keep or to give back to Mrs. Crawford (then Mrs. Monroe) or to collect. I think it was $250, but am not sure about it. Afterward I kept the note until it was demanded by Mrs. Monroe. This, I believe, was some time along in the summer of 1876. Mrs. Monroe came to my house in Hancock, saying that her husband requested here to do so. (Objection noted to the last three replies as incompetent and immaterial.) She said Mr. Monroe wanted her to come and get the note; that he hadn't time to do it. She said Mr. McKay had informed them that Mr. Moore had no claim to
36 the land. She said that it was worthless, anyway. I refused giving her the note. She said Mr. Monroe wanted the note. When I refused to give her the note she cried and felt bad about it. She said nothing else about the land. I consulted Mr. McKay, and he told me I might do as I pleased about it. She said Mr. Moore had no title to the land and Mr. Monroe wanted his note. She said the note was given in payment of this piece of land that Moore had given a deed for.

All the foregoing testimony relating — what Mrs. Monroe said about the nature of this note and its return seasonably objected to as incompetent and immaterial.

I gave her the note. She claimed now, she had got the note, they were square, and Mr. Moore could keep his land. This was before Mr. Monroe left the county.

(The foregoing seasonably objected to as incompetent and immaterial.)

Three years ago last summer I heard Mrs. Monroe speak of money having been paid by Mr. Moore on a note which he had given to Mr. Monroe. This was at my home in Hancock. She said it was borrowed money; money that Mr. Moore had borrowed of Mr. Monroe. She said the remainder was paid in Ishpeming to her. She said a part of it was paid to Hansen, a justice of the peace in Ishpeming.

Same objection as last above seasonably made to the testimony relating to borrowed money.

She said Mr. Moore had treated her very gentlemanly and had paid her all up.

(Objected to as incompetent and immaterial.)

Mr. and Mrs. Monroe left Marquette county in the spring. It was

five years last summer that he died. He died the same year they left. I am not certain about the year the deed to Moore was talked about and I asked to sign it.

37 I am a sister of Mrs. Monroe (now Mrs. Crawford).

Cross-examination of JANE MCKAY:

Q. Why wouldn't you sign the deed to Moore?

A. Because there was some business between him and Mr. McKay that was unsettled.

Q. Mr. McKay had signed the deed, hadn't he?

A. I didn't see Mr. McKay sign it.

Q. Where were you asked to go to sign the deed?

A. I believe it was before Mr. Viele, in the railroad office in Hancock.

Q. Mr. McKay asked you to go there and sign it?

A. Yes, sir.

Q. Why, then, should you refuse?

A. Because there was a business matter between Mr. McKay and Mr. —oore that was unsettled.

Q. What was that to you?

A. Well, it was pertaining to our financial affairs, and I wanted to see that settled first.

Q. As your husband wished you to sign, what interest had you not to sign?

A. Because I wanted to see this affair settled before I signed away any property.

Q. How much was owing from Mr. Moore to Mr. McKay?

Objected to as irrelevant.

A. I had rather not answer; it was private business. I refuse to answer it.

Q. Were the objections that you had to signing the deed ever removed?

A. Yes; but not while that deed was in existence. It was three years ago last summer or winter. It was before I signed the deed to Mrs. Moore.

Q. At the time you gave the note to Mrs. Crawford, then

38 Mrs. Monroe, what did you tell her to do with it?

A. I don't know as I told her to do anything with it.

Q. Didn't you tell Mrs. Monroe to keep it, as it might be called for?

A. Not to my knowledge.

Objected to as irrelevant.

Q. Do you remember talking with Mr. Crawford about this land in the summer of 1881?

A. I remember their coming there one evening—Mr. Crawford and his wife.

Q. When did you first hear that this land had any value?

A. It has been the supposition all along. Mr. Moore went out

there nine or ten years ago. There was an outcrop of iron ore on it, as I was told by Mr. Moore. I heard that right along.

Q. Did Mr. Moore consider it valuable?

A. I don't know what he considered it at that time, but his idea was it would become valuable.

Q. At the time you gave the note to Mrs. Crawford did she know why Moore couldn't get a deed?

Objected to as irrelevant.

A. I presume it was talked over between us. She knew that I wouldn't sign the deed; I told her I wouldn't.

Q. Did she know why you wouldn't sign it?

Objected to as irrelevant.

A. I told her there was business unsettled between Mr. Moore and Mr. McKay, and I never would sign unless it was settled.

Q. Did you tell her the nature of the business?

A. I don't remember.

Q. Why did you suppose this note was a note given on account of the purchase of this land?

A. I was told it was by Mrs. Monroe and Mr. McKay's brother.

Q. Do you remember in July, 1881, in Hancock, saying to Mr. Crawford, on the sidewalk in front of your house, in substance, that Mrs. Monroe was well fixed because she owned as much interest in that land as you, or you and your husband?

39

Objected to by defendants' counsel as irrelevant.

A. I don't remember having any such conversation. I don't know why the deed was given to Mrs. Moore. I was asked to sign, and signed without asking any questions. I am not sure who requested me to sign it, but I think it was Mr. Moore that forwarded the deed to me to sign.

JANE McKAY.

JOHN McKAY, being by me duly sworn on behalf of defendants, deposes and says as follows in answer to questions by Mr. BALL, one of defendants' solicitors:

I live at Ashland, Wisconsin. In 1874, 1875, and 1876 I was living at Hancock, Houghton county, Michigan. I was interested with James H. McDonald in the purchase of the northeast quarter of section 16, town. 47 north, of range 46 west, Ontonagon county, Michigan. It was bought from the State of Michigan in the name of myself and McDonald.

There was a deed duly made out but never delivered for the purpose of conveying an interest to Nathaniel D. Moore. This, to the best of my recollection, was during the year 1875, I think; I can't be certain about it. A deed was drawn up, as I understood it, for the purpose of conveying an interest to Moore. It was drawn up to be signed by Mr. McDonald and myself and our wives, I expect. I

signed it and I think Mr. McDonald signed, though I
40 wouldn't be certain. I don't know whether he signed it or not. I don't know whether McDonald's wife signed it or not; my wife refused to sign it. After it was drawn up and signed by those who did sign it Mr. McDonald gave it to Mr. Viele and told him to lock it up and not give it to Moore without orders from him. I didn't give any directions that I remember of; Mr. McDonald gave the orders for himself. The deed was never deliver to Moore, to my knowledge. I don't think it ever was; I am satisfied it was not. I never authorized anybody on my part to deliver it to him. I don't know what became of the deed. I inquired of Mr. Viele about it, and he said he didn't know what had become of it; that it was lost. Monroe wrote to me inquiring whether Moore had an interest in the land; this must have been in 1875 or in the fore part of 1876, to the best of my recollection. He said in the letter he had been talking with Moore and would like to buy an interest in it. I don't remember what was done with the letter; I didn't preserve it. I answered by letter that Mr. Moore had no claim in the property; that McDonald and I owned it; that Moore hadn't got any deed of it. Shortly after Monroe wrote me I heard from the McIntyre boys, my brothers-in-law, that Monroe had bought an interest in the land from Moore.

Q. Did you see or know anything about the note that was said to have been given for the purchase price?

A. Yes, sir; the first I knew about it, my brother come to my place and had the note in his trunk; looking over the trunk, he took the note out and left it at my place. I understood from him at the time that this note was given by Monroe to Moore as payment for this interest in sixteen. (This objected to as incompetent, immaterial, and hearsay.) I understood that my wife was to do
41 about as she had a mind to with it; it was left with her. Mrs. Crawford (then Mrs. Monroe) came after the note. It was in the summer of 1876, as near as I can recollect—in July or August or thereabout. I was present at the interview or a part of it between my wife and her. She said her husband had sent her up after the note he had given Mr. Moore (objected to as incompetent, immaterial, and hearsay); that he was very busy at the time, and couldn't come; that she could go to Calumet and make a visit to her father and mother and carry the note back with her when she went home. I spoke up and told her I thought the note belonged to Mr. Moore, wasn't paid, and that I had no orders to give it up, and didn't propose to give it to her. She commenced to cry about it, and felt very bad over it, and claimed her husband had worked hard a good many days for that note, and that it was too bad for him to lose it. She said Mr. Moore had given him a deed of this piece of land he had no claim to, and that it was worthless, and she wanted the note. My wife asked me if I didn't think she had better give it up, and I told her I thought the note belonged to Moore till it was paid for, but she might do as she wished, so my wife gave her the note. She felt a good deal better, but allowed it didn't make much difference whether she got the

note or not, because she intended to keep Mr. Monroe in debt in the store while he remained on Lake Superior, so that it would be impossible for Mr. Moore or anybody else to ever collect a dollar on it; but, now she had the note, the land was worthless, and she was square with him now, and he could take the land and keep it.

All that portion of the foregoing testimony relating to what Mrs. Monroe said about the note and about the directions given to her by her husband respecting it seasonably objected to as incompetent, immaterial, and hearsay.

42 I was at my place when Mrs. Monroe came there and spoke of having collected the balance of the money due from Moore. This was, I think, three years ago last summer, as near as I can recollect. She said Mr. Moore had acted very gentlemanly with her, and had paid her up all her money, with interest. I think she said Mr. Hanson, of Ishpeming, held a note of some description, and had collected a part of the money, and Moore had paid her the balance. I understood it to be borrowed money—borrowed by Mr. Moore from Mr. Monroe.

All the foregoing relating to what Mrs. Monroe said seasonably objected to as incompetent and irrelevant.

Q. When that land was purchased what knowledge had you and McDonald and Moore of its value?

A. We bought it on speculation; understood from Moore it was on an iron range, and thought we might find ore in it and make a little money out of it. After looking up the lines this outcrop was found to be on section 15. No good ore was known to be on it until the Cambria Company went in to explore. I think this will be four years next May. Up to that time we had no knowledge of any particular value to it. We thought it might turn out all right on account of being in the iron range.

Q. When was it sufficiently explored to show that it had large value for iron ore?

A. This was in March or April, 1882, as near as I recollect. This became known by the explorations of the Cambria Iron Company, to which we had given an option on it. About five years ago Mr. McDonald offered me a third interest in it for $500; this was all his interest. (This offer objected to seasonably as incompetent and immaterial.) Mrs. Monroe showed me her husband's deed from Moore when she was at my place three years ago—three years
43 last summer, as near as I remember; she claimed she had a deed for the property and thought she could get it. That is the first I knew of her claiming any interest in the property since the note was given up to her. The Cambria Company was then exploring, and it was reported they had struck some ore, but it was not known what it amounted to. We expected they would strike ore and began to think the property worth something. I now own a one-sixth interest in the property; have owned that ever since I first bought it. I have no interest in the one-third that was deeded to Mrs. Moore. At this last conversation with Mrs. Crawford she

wanted me to look it up and see if I could get the interest for her. I didn't say much at that time. She allowed if I would get her that interest she would make it all right with me. Then she went home to Canada. She wrote me once or twice and wanted I should look the matter up for her, so at last I wrote to her that I thought she had no right to the property because she had got the note back, but at the same time she might employ an attorney and look it up if she wished. (Objected to as incompetent, thus to prove contents of a letter.) She said nothing more about it until after her marriage to Crawford, when they both came to my house in Hancock. She said Mr. Moore was giving her a bad deal on that land interest of hers. I asked her how that was, and she allowed he wouldn't give it to her, so I told her I didn't consider she had any right to it, as I wrote her before; that she had got her note back, and I didn't consider she had any right to it at all. She admitted getting the note back and said that Mr. Moore had plenty of property without this piece and it would serve him right to get beat out of it.

The above admission seasonably objected to as incompetent and immaterial.

44 Cross-examination of JOHN MCKAY by T. L. CHADBOURNE:

I know nothing about what that note was given for, except what I heard Mrs. Monroe and my brother say.

(Complainants now object to all the testimony of this witness as to what the note was given for.)

Q. What arrangement was made as to Moore's interest in the land at or before the time you and McDonald entered it?

A. The arrangement was made in the first place between Moore and McDonald. They talked the matter over, and then McDonald came to me and asked me to furnish half the money and take an interest in —; that he and I would furnish the money necessary to buy the land. I told him all right. He said, Of course we will have to allow Moore an interest for looking the lands up, getting the minutes, and going to Lansing to enter it. I understood that Moore was to have an interest, as all explorers get an interest generally; I understood that he was to have one-third.

(Defendants' counsel here objects to this evidence as incompetent, because it was an oral arrangement and within the statute of frauds.)

I don't think we gave Moore any memorandum about it then or at any time; I don't remember us giving him any writing for it.

Moore went down to Lansing and entered the land in the latter part of 1874 or fore part of 1875, as near as I recollect.

McDonald and I furnished the money for him to carry down to Lansing to buy the land.

Q. Was the deed that was made out or partly made out and given to Viele made to carry out the understanding with Moore that you have spoken of?

45 Objected to; irrelevant and incompetent.

A. I understood it so.

Q. Was there any new understanding or agreement with Moore relating to the land between the times of making the Viele deed and the first understanding you have mentioned?

A. Not that I remember.

Q. Was the deed that you and Mr. McDonald and your wives made to Mrs. Moore for the one-third interest, made at Mr. Moore's request, based upon your first understanding with him?

Objected to as incompetent and irrelevant.

A. Our first understanding was that he was to have this third interest himself.

Q. How did this deed come to be made to Mrs. Moore instead of Mr. Moore?

A. The deed was made down at Norway mine, Menominee range, and presented to us to sign. It was a small matter to us whether we deeded it to her or to him, and we signed the deed there. We went into an office where the deed was; Mr. Moore was there, and the attorney or justice of the peace read over the deed to us and asked us to sign it, and we signed it.

Q. Who took the deed?

A. The man who presented it to us to sign kept it, and I don't know anything more about it.

Q. How did you come to go to the office to sign it?

A. I don't remember.

Q. Had you seen Mr. Moore or heard from him shortly before that?

A. Moore was working down on the Felch Mountain range, and he wrote up to McDonald and me to come down to make arrangements about giving an option of the property to the Cambria Iron Company; that is the way we came to go down.

Q. Before making a deed to Mrs. Moore, did any communications pass between you and her about it?

A. No, sir.

46 Q. Was there any consideration for the deed to Mrs. Moore, except your original understanding with Mr. Moore?

A. I believe there was a dollar; don't remember any more.

Q. Was the dollar paid, or was it only stated in the deed in the usual form?

A. I think it was paid; am not positive, but I think it was.

Q. By whom to whom?

A. I don't remember.

Q. You wouldn't have made the deed except for the original understanding with Moore?

Objected to; irrelevant.

A. It is not likely that we would. We wouldn't have deeded away an interest without we had promised or partly agreed with Moore to give him an interest.

Q. Did you and Mr. McDonald borrow the money which you furnished to Moore to enter the lands?

Objected to; irrevelant.

A. I don't know what Mr. McDonald did; I got money from my brother-in-law, W. D. McIntyre, and told him I would give him an interest in the land, and I deeded him an interest (one-sixth) a year and a half or two years ago.

Objected to as irrelevant.

Q. Why did your wife refuse to sign the deed to Moore?

Objection; irrelevant.

A. There were business transactions between us that were not settled, and she would not sign it on that account.

Q. Was it anything relating to this land?

A. I don't think it was relating to this particular piece, but it was relating to land.

Q. In 1881, when Mrs. Monroe brought her husband's deed to you, as you have mentioned, was anything said between you about back taxes on the land?

A. I don't remember; there might have been.

47 Q. Was there something to this effect—that there were back taxes on the land, and she would be called on to pay her share if she said anything about her interest, and it would be time enough when it was known that the property was turning out good?

Objection; irrelevant.

A. I don't remember.

Q. When Monroe wrote to you in 1875, inquiring whether Moore had an interest in the land, what did you tell him, if anything, about your arrangement with Moore?

Objected to; irrelevant.

A. I don't remember.

Q. Did you see Monroe after that about it?

A. I don't think I ever spoke with Monroe about the land at all. I only wrote one letter, as I recollect. I told him in my letter that Moore had no deed and had no claim to it, as near as I remember.

Objected by complainants' counsel to parol proof of contents of the letter.

Q. Did you believe that Moore had no honest claim to the land?

A. I believed he had no claim to the land until he had a deed, and had it on record. That was my idea then—is my idea yet. It was after the letters had passed between Monroe and me that Mrs. Monroe came up to get the note. It was a few months after—one, two, three, or four months.

Q. Then you gave Mr. Monroe to understand by letter that Moore had no claim whatever of any kind upon this land?

A. Yes, sir; he asked the question, and I wrote him that Moore had no deed of it and no claim, or words to that effect.

Q. And you don't remember telling him of the arrangement between McDonald and yourself and Mr. Moore?

A. I don't remember of doing so. I don't think I did.

48 Q. When Mrs. Monroe came to get the note, did you tell her or did your wife tell her about the arrangement with Moore?

A. I don't remember of either of us telling her anything about it. I don't remember whether the deed was deposited with Viele before or after my correspondence with Monroe. At the time Mrs. Monroe demanded the note back I think, likely, the deed had been deposited with Viele, but am not certain. When Mrs. Monroe told my wife and me about Moore having repaid money to her I think Moore was present.

Q. When Mrs. Monroe was at your house, at the time the note was there in your wife's possession, do you remember her asking you or your wife if she would have to pay the note?

A. No, sir.

Q. Do you remember your wife telling her not to lose the note; that if William McKay came after it she would have to produce it?

Objected to as irrelevant and incompetent.

A. No, sir.

Q. Do you remember your wife stating that your brother said he had got the note from Moore for wages?

A. No, sir.

JOHN McKAY.

I hereby certify that the foregoing depositions of John McKay and Jane McKay were taken before me on the 8th day of January, 1885, on behalf of defendants, Mr. D. H. Ball attending on behalf of defendants and Mr. T. L. Chadbourne on behalf of complainants; that each of said witnesses was first duly sworn by me to tell the truth, the whole truth, and nothing but the truth relating to the matter of said suit; that the testimony was reduced

49 to writing under my directions and in my presence, and signed by the witnesses, respectively, in my presence after the depositions had been severally read over to them.

In witness whereof I have hereunto set my hand and official seal the 8th day of January, 1885.

[SEAL.] JOHN H. ELSNER,
Clerk of the Circuit Court, Ashland County, Wis.

Depositions of James H. McDonald and N. D. Moore, Taken Jan. 20, 1885. *Filed Jan.* 4, 1886.

JAMES H. MCDONALD, being duly sworn, examined in chief by Mr. BALL, testified as follows:

Q. What is your name, age, and place of residence?

A. My age is fifty-three next May; name, James H. McDonald; and residence, Escanaba, Michigan.

Q. What is your business?

A. Railroading.

Q. Are you acquainted with Nathaniel D. Moore?

A. Yes, sir.

Q. How long have you known him?

A. I have known Mr. Moore since—I couldn't hardly tell exactly—about since '73.

Q. And ever since that time?

A. Yes, sir.

Q. Did you know John Monroe in his lifetime?

A. Yes, sir.

Q. Where was John Monroe living at the time you knew him?

A. He was living at Lake Angeline, in Marquette county.

Q. You know of the piece of land concerning which there
50 is a controversy in this suit—the northeast quarter of section 16, town. 47, range 46?

A. Yes, sir.

Q. Are you interested in that land?

A. Yes, sir.

Q. What interest do you own?

A. Own one-third.

Q. Have you any interest in the one-sixth interest that is in controversy in this suit?

A. No, sir.

Q. That land, as you have testified before in this case, was entered in the name of yourself and John McKay by moneys furnished by you and McKay?

A. I couldn't tell whether John McKay was in the original deed or not, but the land was entered by me, as I understood it; unless I look at the deed I couldn't say, but if my memory is correct it was entered in my name.

Q. (Refers to abstracts.) Then it was entered in both your names?

A. Yes, sir.

Q. The money all furnished by you and McKay?

A. Yes, sir.

Objected to as immaterial.

Q. Did you have a conversation afterward with John Monroe about the land and about his having purchased an interest from Moore?

A. Yes, sir.

Q. When was it, as near as you can state?

A. I think it was in '75 or '76; I wouldn't be sure, but it was at the time we was building that branch into the Cambria.

Q. Building a branch railroad into the Cambria mine?

A. Yes, sir.

Q. Can you state what year it was?

A. I have an idea that it was in '76.

Q. What time in the year?

A. Somewheres in the—I wouldn't be positive, but it was during the summer, either in June or July, somewheres around there; I couldn't be sure; I could tell exactly if I was at home.

51 Q. State what the conversation was.

Objected to as incompetent.

A. Well, I came into Ishpeming one time there, and he met me there on the railroad track, right on the old platform there, and he was asking me about Mr. Moore's owing him, and he wished I could collect some money from him, and offered me a note of Mr. Moore's, asking me if I could get hold of some money.

Q. Mr. Moore working for you at that time?

A. Mr. Moore was working for me at that time—yes, sir: I told him I couldn't do anything—that Mr. Moore was owing me; I told him I didn't think it was any use; and then he spoke of this land in section sixteen, and asked my opinion about it. I told him I didn't know anything about it; didn't know if it was worth a dollar and a quarter an acre or not. I told him I offered to sell to McKay for $500.

Q. Offered what?

A. My interest in the land.

Q. What was your interest?

A. One-third; he told me that he didn't care about the land, and if he could get his money out of Moore he didn't want the land; it wasn't worth a cent anyway; he wouldn't have it.

Q. Did he ask you whether Moore had any interest in it?

Objected to as immaterial and incompetent.

A. Yes, sir; he asked me if Moore had an interest in it; I told him he would have when he paid me; he didn't have any interest in it yet.

Q. What did he say to that?

A. I forget now what he said, but he carried the idea that he didn't care anything about the land, but he wanted I should take this note, and he would take the money as I could get it out of Moore. He didn't show me the note, but offered to let me take it.

Q. Whom was the note against?

A. The note was against Moore.

52 Q. Do you remember anything about the amount of the note?

A. I couldn't say what the amount of the note was; I never asked him, because I made up my mind not to take it, but I told him if Moore would get ahead I would let him know; so we parted upon those conditions.

Q. Did Mr. Moore ever apply to you to give him a deed of the land?

Objected to as incompetent and immaterial.

A. Well, I don't remember if he ever did, until I gave it to him.

Q. Gave it to him, you mean? Did you ever give Mr. Moore a deed of the land?

A. No; I have left a deed here that was partially made out; I couldn't say whether I signed it or not, but I left it with McKay or Viele, with instructions to McKay never to sign that deed until he would hear from me.

Q. Do you know when that was?

A. That must have been in the fall of '75.

Q. Did you refuse or decline to give Mr. Moore a deed of any interest in the land up to any particular time?

Objected to as incompetent and immaterial and leading.

Q. I will ask another question. State whether, up to the time you had this talk with Monroe, you had consented or was willing to deed any interest in the land to Moore.

Objected to as incompetent and immaterial.

A. I don't know as I ever made—had any conversation with Moore. I don't remember that I ever had any conversation with Moore about giving the land, because it was understood between us, between Moore and I, that he should have an interest any time he called for it.

Q. You spoke about his paying you?

A. I was to hold that back until he paid me.

53 Q. Did he owe you?

A. Yes, sir.

Q. State whether you ever had any written agreement with Moore to give him any interest.

Objected to as incompetent and immaterial.

A. No, sir; I never; I don't recollect having any written agreement.

Q. Do you know what became of that deed that you say was partly made out?

A. No, sir; I never saw it from that day to this.

Q. Did you ever give any further instructions to anybody to deliver it?

A. No, sir.

Q. State whether it has been ascertained at any time that this land had considerable value.

Objected to as immaterial and incompetent.

A. I never knew it was of any value until we let the option to the Cambria Mining Company.

Q. What option do you mean?

A. We let an option to the Cambria Iron and Steel Company of Johnston, Pa., to mine ore if they could find it; gave them a privilege of exploring for iron; if they found iron they was to pay us so much for the iron.

Q. When was that?

A. That must have been in '81.
Q. Did they explore it after that—after this option?
A. Yes, sir.
Q. About what time was it that they first developed mineral value there—that is, to show that there was mineral value there?

Objected to as incompetent and immaterial.

A. Well, in the spring; I couldn't say what time that was, but it must have been in the following spring.
Q. The time you gave the option?
A. The following spring after we gave the option.
Q. Well, what was the result of that exploration which they made?

Same objection.

54 A. Well, the result was that they found ore and they were pretty well satisfied, and offered us—they were willing to take the land if we would make a deduction of fifteen thousand dollars from the price agreed upon.
Q. What I want to get at is—I speak of the result of their explorations, whether their exploration proved that it had great value as an iron-ore property.

Same objection.

A. I couldn't say as to that; it seems they didn't think best to take it; they didn't take it, anyway; I was afraid at the time there must have been something wrong or they would have taken it.
Q. Do you know whether it has turned out to be a valuable property?
A. They say it is very valuable.
Q. It is so reported?
A. It is so reported.

Further objected to on the ground that it is based upon mere hearsay.

Q. When was it that it was first understood or reported to be very valuable as an iron-ore property?

Objected to as incompetent and immaterial, and that the answer must be based upon mere hearsay.

A. It was reported to be very valuable on the Cambria exploration when they gave up their contract; it was so reported then.
Q. That was the first it was so understood?
A. Yes, sir; Mr. Stackhouse offered us fifty thousand dollars for a half interest.
Q. When Monroe talked with you about the land, state whether he said anything about having purchased an interest from Moore.

Objected to as incompetent.

A. It was at that time that he met me at Ishpeming; I was never acquainted with him much then.

55 Q. Did he say anything about having purchased anything from Moore?

A. He said he had a deed from Moore. I said I didn't see how he could have a deed from Moore when he hasn't got a deed himself.

Cross-examination by Mr. GRANT:

Q. Captain, what was the money that Mr. Moore owed you at this time for which you kept back this deed for?

Objected to as irrelevant.

A. I sold him a pony and took his note for one, and I forgot what other bills back and forward; when he wanted money I would give it to him.

Q. It was simply, then, for money and other things which you let him have?

A. Yes, sir; the pony was for one of them—one of the bills that I took his note for.

Q. Where was you, Captain, when you made out this deed or partly made out this deed to Mr. Moore?

A. I was at Hancock.

Q. Living here then?

A. Yes, sir.

Q. Your wife was living here?

A. I wouldn't be sure whether my wife was here at that time or not. I don't know whether I went away with my family or not.

Q. Wasn't that deed, Captain, signed and acknowledged by you and your wife?

A. I wouldn't be sure; I couldn't say whether it was or not.

Q. Don't you remember Mr. Viele's taking the acknowledgement of you and your wife to that deed?

A. In fact, it is something that I have forgotten all about; I wouldn't have thought of that deed if you hadn't put me in mind of it; I couldn't say; it might have been so.

56 Q. When you delivered it to Mr. Viele or to Mr. McKay you instructed the one to whom you delivered it not to deliver it till he heard from you?

A. Yes, sir.

Q. And the payment of this money you allude to was the only objection you had to the delivery of the deed to Mr. Moore?

Same objection.

A. When I was satisfied as to the debt—that what he owed me would be paid—it was to be delivered.

Q. That was the only objection to delivering it; it was only on account of that that you gave instructions not to deliver the deed?

A. Yes, sir.

Q. Who was this Mr. Viele?

A. Mr. Viele was conductor and auditor of the Mineral Range railroad.

Q. Living in Hancock at that time?

A. Yes, sir.

Q. And a notary public?

A. Yes, sir.

Q. You know, of course, Captain, that the deed wouldn't be of any use unless signed by you and your wife?

Objected to as incompetent and irrelevant.

A. I don't understand that.

Q. The deed wouldn't amount to anything unless signed by you and your wife?

A. No; of course not.

Q. You wouldn't have given instructions not to deliver it, then, unless it had been signed by you and your wife?

A. That would have been the natural way of thinking, but I don't remember ever signing it.

Q. What was Monroe doing at Lake Angeline?

A. He was a blacksmith.

Q. Was that the first time you ever saw him to know him?

A. I think that was the first time I ever saw him to know him.

57 Q. Had you taken any particular pains to charge yourself with this conversation?

A. No, sir; I was around after my own business, and I went in there to get some blacksmith work done.

Q. Were the instructions you gave to McKay in regard to this deed by letter, or did you tell him?

A. I told him verbally.

Q. You told him not to sign or not to deliver, which?

A. I couldn't say; I think I told him not to deliver that deed until he heard from me.

Q. Now, the money which Mr. Moore owed you for which you kept back the deed, as you say, was finally paid to Moore, wasn't it?

Objected to as irrelevant and incompetent.

A. Well, I don't know; at any rate, if it wasn't paid, we squared up.

Q. It was either paid or arranged between you?

A. Yes, sir; I didn't claim to have anything against him.

Q. When you made out the deed to Mrs. Moore there was no money paid by her at that time, was there, to you or to McKay?

A. Yes, sir.

Q. What?

A. I believe Mr. Moore gave me two dollars when I gave him the deed.

Q. What did he give you two dollars for?

A. I had an idea that it wouldn't be lawful without. Whenever I signed a deed for the railroad the company always gives me two dollars, and I went upon that basis when I gave him that deed, and

I felt that he ought to give the two dollars, anyway, that we might have a drink on it.

Redirect examination by Mr. BALL:

Q. Do you think your wife ever knew anything about the transaction or signed the deed?

A. I don't remember that I ever told my wife anything about it until I brought her with me to have it signed.

58 Q. To sign the deed to Mrs. Moore?

A. Yes, sir.

Q. When was it that the matter of the indebtedness from Moore to you was finally arranged and satisfied?

A. Well, I think it was about the time he went off to Ashland, after he left the Cambria.

Q. And when was that?

A. That must have been in '77, if I remember right; I couldn't say the time; I think it must have been in '77.

Q. About the time he left and went off to Ashland, you say?

A. Yes, sir.

J. H. McDONALD.

NATHANIEL D. MOORE, being duly sworn, examined in chief by Mr. BALL, testified as follows:

Q. State your name, age and residence.

A. Age, thirty-seven; name, Nathaniel D. Moore; residence, Ashland, Wisconsin.

Q. How long have you resided at Ashland, Wisconsin?

A. I went to Ashland in '72 first, and left it in '76, and returned to Ashland in '79, I think; I think it is '79.

Q. You have lived there ever since that?

A. Yes, sir.

Q. You are one of the defendants in this suit?

A. Yes, sir.

Q. To whom does the interest—the land interest in controversy in this suit—belong?

Objected to as incompetent and immaterial and as calling for the witness' opinion.

A. To my wife, Mrs. Helen Moore.

Q. The other defendant in this suit?

A. Yes, sir.

59 Q. State whether you have ever received from her any conveyance or contract of any kind for an interest in this property.

Objected to as immaterial.

A. No, sir.

Q. Do you know the land in controversy?

A. Yes, sir.

Q. Did you examine the land before it was purchased from the State of Michigan?

A. Yes, sir.

Q. And you went to the State land office to enter it, did you?

A. Yes, sir.

Q. By whom was the money furnished to enter the land?

A. By Mr. McDonald and Mr. McKay.

Q. James McDonald and John McKay?

A. Yes, sir; I think the money was handed to me by Mr. McDonald himself, but I understood Mr. McKay was paying half.

Q. State whether you had any contract in writing with them or either of them that you should have an interest in the land.

Objected to as immaterial.

A. No, sir.

Q. Did you ever receive any deed from them or either of them for any interest in it?

A. No, sir.

Q. Did you know of the deed having been made out or partly made out and left with Mr. Viele at Hancock?

A. No, sir; I didn't know anything about it.

Q. No such a deed was ever delivered to you then by Mr. Viele or Mr. McKay?

A. No, sir.

Q. Did you ever see it?

A. No, sir.

Q. State whether, when you entered the land in the names of McDonald and McKay, you expected to have an interest in it.

A. I did; yes, sir.

Q. What interest did you expect to have?

A. I expected to have a third interest.

Q. You afterward executed a deed to John Monroe for a sixth interest in the property?

A. Yes, sir.

60 Q. Will you state what conversation was had between you and Monroe in regard to that deed and how it came about?

Objected to as incompetent under the statute, Monroe being dead and the witness being a party to the suit.

A. Do you wish me to tell the whole transaction in regard to getting the money, or merely in reference to this deed?

Q. The whole transaction connected with the deed and what occurred at this time.

Same objection.

A. Mr. Monroe had asked me repeatedly to give him a chance to get in some lands, and I told him I would; the first chance I see for getting a chance to enter some lands I would give it to him.

Q. You were engaged in exploring wild lands, were you?

A. Yes, sir; I found a forty acres of school lands south of Agogeebic Lake on which I took some specimens that I thought con-

tained probably mineral. I went to Mr. Ropes, in Ishpeming, who made four or five tests of the rock and pronounced it cobalt and nickel and said he thought there was a trace of tin in it, and that the property would be valuable. I had no money myself at the time, and I went to John Monroe and told him if he wished to enter the land and give me a half interest I would furnish the minutes; he said he would be very glad to do it.

Mr. CHADBOURNE: This testimony respecting this forty acres of land objected to for the reason last above given and for the additional reason that it is immaterial and incompetent under the pleadings.

I told him that if he would give me one hundred and fifty dollars that I would go and enter the lands—forty acres; he done so; he gave me one hundred and fifty dollars. I think that the
61 transaction was made before a justice of the peace in Ishpeming by the name of Hansen. After he gave me the money he said, Now I would like very much to get an interest in that land that you and McKay and McDonald are into. I said, All right; I will sell you a half of my interest for two hundred and fifty dollars. That was the consideration. Then he says, I would like very much to take it, but you have got all the money that I can spare at present; and I was feeling pretty well over getting that money, and I told him I would take his note; the length of time I forget; I forget what was the time on the note; he said all right.

By Mr. CHADBOURNE: What was the amount?

A. $250, the amount of the purchase. I told him then that I had not received my deed from McDonald and McKay, but that I expected to receive it, and probably it was made out then. I didn't know anything about it. That was a very short time after we had entered it. He said that was all right for me to give him a warranty deed. I done so. He paid me ten dollars. He said, I will give you ten dollars. He gave me ten dollars, and the note was made for two hundred and forty dollars. That is all of that transaction.

Q. State whether you entered the land that he gave you the money for.

A. No, sir; I didn't, because the land was entered; when I went to get it it was entered.

Q. Did you have any conversation after that about this land that you had given a deed for?

A. I don't remember of having any until we had the settlement about the money, at the Cambrian mine, in '76, in August or September. I ain't sure, but I was building a branch for Mr. McDonald here. Mr. Monroe came to me——

Mr. GRANT: Same objection to this conversation as to the last.

62 He told me he wanted me to pay him the money that he had given me to enter that land. I told him I didn't have any money; that Mr. McDonald was keeping back my wages for money that I owed him, but just as soon as I could possibly pay him I would do so, and if he would be willing to take it in installments I

would pay it as fast as I could, and he told me that he knew I had no deed to the land and knew that I would never get a deed.

Q. What land did he speak of then?

A. The land in 16. He says, I don't want the land. I don't think it is of any account, anyway. He told me then that he had been talking with Mr. McDonald, and Mr. McDonald told him he wasn't sure whether I would ever have a deed of it. I told him that the note which he gave me was in the possession of Mr. or Mrs. McKay. He says, I know that. I can get the note from them, and I will send you your deed back. I haven't had it recorded.

Q. Well, what did you say to that?

A. I told him that was all right. He waited until six o'clock, until I got through with my work. We went into Negaunee. We went into Mr. Schadt's. He said, I gave you one hundred and fifty dollars to enter the lands and ten dollars on the other land, and he said, If you give me your note for one hundred and sixty dollars I won't charge you any interest for the time you have had the money. I done so.

Q. State, there, what you said, if anything, as to his proposition to get the note from McKay.

A. I told him if he could get the note it was all right. A few months after that I got hurt at the Cambria. I was blown up, and couldn't work for about three months, I guess, and after I got well the management was changed and I was discharged. I went to work for the Iron Cliffs Company in the Pioneer mine. Mr. Monroe came down from Ishpeming and asked me if I could pay anything,
and I told him that I had no money; that I had only been
63 to work a short time, and that I was paying up some debts
made while I was sick, but if he wanted to take an order on the Iron Cliffs store for twenty dollars I would give him one. He said the order would be just as good to him as the money, as he had to buy provisions for his house, anyway. I gave it to him.

Q. How much did you pay him at that time—that order?

A. Twenty dollars. That was the first payment on the note, and I promised to give him orders as I could. I done so. I gave him three or four or, probably, five orders himself. I think that is all, and he went off, I think. At least, he put the note into the hands of a justice of the peace in Ishpeming, called John Hansen, for collection.

Q. State whether you paid anything on the note to Hansen.

Objected to as immaterial.

A. Yes, sir; I did. I must have paid forty or fifty dollars. I don't know how much. I received a letter from Mrs. Monroe from Canada, I think, stating that she was coming up here——

Objected to as stating the contents of the letter.

Q. When was that?

A. It was a short time previous to the time I paid her the balance of the note. I couldn't say just when that was.

Q. What did you do with the letter?

A. I don't know that I have got it yet. I don't know whether I destroyed it or not.

Q. State what she did—what was done.

A. I met her in Hancock here.

Q. State whether that was before or after her husband died.

A. That was after her husband died. I think she came from Canada. I think she had been living in Canada then. I came down and met her then, and I told her that I would come down——

64 Mr. CHADBOURNE: This conversation with Mrs. Monroe objected to as incompetent and immaterial.

I told her I would pay her way; would pay all expenses; go down with her to Ishpeming and make Hansen settle; see that she got all that was coming to her.

Q. Well, what did you do?

A. Went down to Ishpeming and paid her the full amount of the note, with interest at ten per cent. from the day the note was given.

Q. You mean the balance that was left due on it?

A. Yes, sir. I settled up the note.

Q. Can you tell about when that was?

A. I think two years ago last summer. It must be three years ago last summer, I guess. I could tell if I was home, but I can't tell here.

Q. State whether the note that was given by Monroe to you as part payment of the land was ever paid.

Same objection as above under the statute.

A. No, sir; it was not.

Q. Was anything ever paid on it?

Same objection.

A. Not a cent.

Q. State whether you ever saw the note after you had the talk with Monroe about his getting it from McKay?

A. No, sir; I did not.

Q. Do you recollect whether anything was said between you and Monroe about his giving you a quitclaim deed back again or not?

Same objection under the statute.

A. I do not.

Q. You don't remember?

A. No, sir.

Q. State whether anything was said by him to you afterward about his having an interest in the land or wanting it.

Same objection.

A. After that?

65 Q. Yes; after that conversation.

A. No, sir; we never talked any about the land after that.

Q. What time did Monroe go away from Ishpeming or Negaunee?

A. I can't tell.

Q. Do you know what time he died?

A. I do not.

Q. Did you ever have any conversation with Monroe after that conversation you speak of—when he said that he could get the note from McKay—as to whether he had got the note?

A. No, sir.

Q. Ever have any conversation with Mrs. Monroe—the present Mrs. Crawford—as to whether they had got the note or not?

A. No, sir; not that I can remember. I don't remember saying anything to her about it. He and I—we didn't talk but a few moments the evening we came down to Negaunee after the order.

Q. At the time you examined the land before it was entered what did you ascertain about its value?

A. Well, I expected that there was iron on it. There was no outcrop on the land whatever, but there was an outcrop of lean ore close to the east line of it, and on the strength of that I supposed, of course, that it would run through there.

Q. Did you have any further knowledge after that about the value of the land up to the time when Monroe told you he didn't want the land and wanted to get his money back?

A. No, sir; none whatever.

Q. Has the land been explored and developed since?

A. Yes, sir.

Q. By the Cambria Iron and Steel Company to whom you gave an option?

A. Yes, sir.

Q. What was the result of their explorations?

A. Well, they have shown up some very fair ore—some very good ore.

66 Q. I want to know whether they have shown it to possess a good deal of value or not.

A. Yes, sir.

Q. That value has been proved and developed by the explorations of the Cambria Iron and Steel Company?

A. Yes, sir.

Q. When was it first ascertained that the property had value beyond what you knew of at the time you first went over it for iron ore?

A. The spring of '82 was the first developments that was made on that property by the Cambria Iron and Steel Company. They had worked considerably on it in '81, but hadn't shown up anything until the spring of '82.

Q. When did you first learn that Mrs. Crawford claimed that she and her children had any interest in this property?

A. I couldn't give you the date; the first mention that I had of it was a letter from a lawyer in Canada.

Q. Stating that she made such a claim?

A. Yes, sir.

Parol evidence of contents of letter objected to as incompetent.

Q. Can you tell about when that was—about what year it was?

A. It must have been in the fall of '81 or in the spring of '82; I am not sure of it.

By Mr. CHADBOURNE:

Q. Do you remember the lawyer's name?
A. I couldn't tell his name.
Q. Was it before the suit was commenced and papers served on you?
A. Yes, sir.
Q. How long before?
A. I should judge three or four months—two or three months.
Q. Was that before or after the Cambria Company had commenced explorations upon the land?
A. That was after it—a long time.
Q. A long time, you say?
A. Yes, sir.
Q. State whether they had at that time shown indications of a valuable property.
67 A. Yes, sir; the indications were very favorable at the time for the development of a good mine.
Q. Did you ever have any conversation with Mrs. Crawford herself about it or any communication from her on the subject?
A. Not a word; no, sir.
Q. At the time that the land was deeded to Mrs. Moore, your wife, state whether you had had any intimation from Mrs. Crawford that she claimed any interest in the land.
A. None whatever.
Q. Or from anybody else?
A. No, sir.

All the foregoing testimony relating to what passed between witness and Monroe seasonably objected to as incompetent under the statute before referred to.

Cross-examination by Mr. CHADBOURNE:

Q. Mr. Moore, how much do you say Monroe paid you, having in view the purchase of this forty acres you have named?
A. One hundred and fifty dollars.
Q. What time was that payment made to you with reference to Monroe's application to you to be let into the land in question in this suit?
A. It was the same day, along in the evening. He didn't pay me over the money, because he had to go to Marquette to get it. He got back in the evening and gave me the money. There was nothing said about the land in suit when he gave me the money; nothing whatever.
Q. He spoke about the other land the same evening?
A. Yes, sir; and, I think, got a deed the same evening.
Q. You think you gave him the deed of the land in question the same evening?

68 A. I think I did, but I wouldn't be sure whether it was the same evening or the next day. It was one or the other.

Q. Did I understand that you gave him the deed of the land in question in this suit the same evening or the next day, after he paid you the money which was to be used in the purchase of this forty that you have named?

A. Yes, sir.

Q. How did he come to know of the land in suit and to ask you about it?

A. Well, I suppose he may have heard from McKay or through McDonald, some way or other. I suppose that was the way he got to know it.

Q. You had not told him anything about it?

A. Not that I remember. I think he was the first one to speak about it.

Q. Where did McKay then live?

A. Hancock.

Q. That is about one hundred miles—ninety or one hundred miles—from where Monroe then lived?

A. I suppose it was about that. Monroe was living at Ishpeming at the time; the New York mine, rather.

Q. Were there any papers passed between you and Monroe with respect to this payment of $150 on account of the forty acres you have mentioned?

A. Well, I am sure I don't remember, but I think it is very likely that I gave him a receipt for the money, stating that it was to apply on purchase of lands or something of that kind. I wouldn't be sure whether I did or not. I think it is very likely. I don't think that John would give me the money without something of the kind; a very careful man.

Q. Were the deed which you gave Monroe and the note which you say he gave as consideration for the deed made and delivered the same day?

A. Yes, sir; the same day.

69 Q. If you gave Monroe a receipt for the $150, do you remember where you got it from—the receipt; whether you had a receipt book, for example?

A. No, sir; I don't. I don't remember whether I gave him any or not; if he asked me for it I suppose I did. I generally did when entering lands; if they gave me money and asked for a receipt I gave it to them, stating the amount of money and where it was to be applied.

Q. You say that Monroe at the time of your conversation said the note was with McKay or Mrs. McKay and he could get it?

A. Yes, sir.

Q. Did you tell him that or did he tell you that?

A. He told me that. I told him it was there and he said that he knew the note was there and he could get it. I have heard since then that he had it at the time.

Mr. CHADBOURNE: This seasonably objected to as hearsay.

Q. Up to the time of this conversation, viz., the conversation when you told Monroe that the note was with McKay and he said he knew it was, until this time had there been anything said between you and Monroe looking to taking back this deed?

A. No, sir; there had not.

Q. Are you positive about that?

A. Yes, sir; I don't remember of ever having seen Mr. Monroe until I saw him there.

Q. How did the note happen to be at McKay's?

A. The note was left there by William McKay, a brother of Mr. McKay.

Q. How did that happen?

A. Well, sir, I got very hard up for money in Ontonagon. I was still exploring, and William McKay and I were in partnership at the time. He said that he had some money in Hancock and that he would go down and get it. I said to him that I would like to have him take the note and see some of the McIntyres; see whether they wouldn't buy the note; at that time, of course, I expected it was all right. I understood that he seen some of them. I knew that Dan. and Archie had money.

Q. Never mind about that.

A. Well, they wouldn't have anything to do with it, anyhow, and he left the note there with Mr. and Mrs. McKay.

Q. For what purpose did he leave the note with Mr. and Mrs. McKay?

A. No purpose that I know of; none whatever.

Q. Had you given him any instuctions to leave it with Mr. or Mrs. McKay?

A. No, sir; I think he left the note with other papers.

Q. Had you given him any instructions with regard to the note, except to raise money on it if he could?

A. None whatever; no, sir.

Q. Then he left it with Mr. and Mrs. McKay without any orders from you to do so?

A. Yes, sir.

Q. And without your knowledge that he had done so.

A. Yes, sir.

Q. When did you first get knowledge that they had it?

A. He told me when he returned that he left it there—asked me if it was all right—with John and his wife. I told him it was all right, just as well for them to have it as for me to have it carrying it around in my pocket. I had no home then and had no place to keep my papers, except to carry them around in my pocket.

Q. At the time you entered the land in question in this suit do I understand it was understood or agreed between you and McDonald and McKay that you were to have a third interest in it?

Objected to as incompetent, as parol evidence of such an agreement is inadmissible.

A. I think it was; whether we talked over it the night they gave me the money or not I can't tell, but my interest for placing lands

was always a quarter or a third or half; of course, I wasn't working for nothing.

71 Q. And the interest you were to have was in consideration of you having looked up and located the land?

A. Yes, sir.

Q. And you relied upon this understanding at the time you gave the deed to Monroe of the one-sixth interest?

Objected to as irrelevant and incompetent.

A. Yes, sir.

Q. And you told Monroe of your interest thus arranged for, did you?

A. Certainly.

Q. At whose request did McDonald and McKay and their wives deed the one-third interest of the lands in question to your wife?

Objected to as irrelevant.

A. Shall I answer that if I don't wish to, Mr. Ball?

Mr. BALL: Answer it under the objection.

A. It was at my request.

Q. You went in person down to Norway and the conveyance of this one-third interest was made to your wife by McDonald and McKay, and subsequently their dower interest in the same was deeded to your wife by Mrs. McDonald and Mrs. McKay?

A. At the time that deed was made I was living at the Felch Mountain. Mr. McDonald and Mr. McKay wrote to me that they wanted to have a conversation with me in Norway in regard to some proposition made to them by the Cambria Iron and Steel Company. It was then that the deed was made. I met them there and they made the deed then.

Q. When did your wife first know that these deeds were made to her?

Objected to as irrelevant.

A. Well, that is something I don't know how to answer. I think she knew that it was going to be deeded to her some time previous to that. Just how long I couldn't say. She was down to Nor-

72 way with me, and I told her that Mr. McDonald and Mr. McKay proposed to deed the land to her.

Q. You mean, do you not, you told her that you proposed to have them deed it to her?

A. I told her, as near as I can remember, that they proposed to deed the land to her.

Q. As a matter of fact, did they make any proposition to deed the land to her——

Objected to as irrelevant.

Q. That was not suggested by you?

A. Mr. McKay and myself and Mr. McDonald and myself talked about it, and whether they made the proposition first or me I couldn't say.

Q. How long was that before the deeds were made to your wife?
A. That was two or three months before, probably more; I wouldn't be sure.
Q. Well, these deeds to your wife were made in consequence of the arrangement that existed from the beginning between you and McDonald and McKay, were they not?

Objected to as irrelevant and incompetent.

A. Yes, sir; they were.
Q. Was that the way they came to be made?
A. Yes, sir.
Q. Why did you not have those deeds made to you?

Objected to as irrelevant.

A. I suppose I can go on and state the answer, Mr. Ball?
Mr. BALL: I guess it won't do any hurt.
Q. That is the question.
A. Well, the reason was on account of this deed being out that I gave to Monroe. I found that that deed had been recorded, and John Monroe was then dead, and I expected that Mrs. Monroe would make trouble; that is exactly the reason.
Q. Did you tell your wife about this?
A. Yes, sir; I think I did.
73 Q. Now, what reason had you to think at that time when these deeds were made to your wife that you would have trouble from Mrs. Monroe?
A. I would rather not answer that. If I answer it I shall give my reasons for it. I thought Mrs. Monroe was a person—from what I knew of her—that would take any advantage that she could; that is exactly the reason.
Q. Had you any reason, from anything that Mrs. Monroe had said, to think that she would make trouble?
A. No; I had not heard anything that Mrs. Monroe had said about that at that time; not that I remember of.
Q. Only because you estimated in a general way that she was of that disposition?
A. Yes, sir.
Q. Did you ever ask Mr. Monroe to deed you back this land, or to give his deed back?
A. No, sir; I didn't after that conversation, because I expected that he would do it, and I didn't wish to hurry him up, or anything of that kind, on account of his giving me time to pay the other. I didn't wish to hurry him, or anything of that kind, not expecting his death or his going away. I didn't know that he was going away.

The reasons given by the witness objected to by complainants as irresponsive and immaterial.

Q. What year did you cease to reside in the iron region near where Mr. Monroe lived?
A. In the spring of '80, I think.

Q. Up to the spring of '80, then, you resided in the close neighborhood of Mr. Monroe, did you?

A. No, sir; all of '79—part of '78 and '79—I was down on the Felch Mountain range, at the Northwestern mine.

Q. How far was that from Monroe's residence?

A. Probably about one hundred and fifty miles; not so much as that—yes, it was all of one hundred and sixty or seventy miles.

74 Mr. BALL: By the way you had to travel it?

A. Yes, sir.

Q. Previous to the time in '78, when you went away from the neighborhood where Monroe was, how near did you live to him?

A. Three or four miles, I guess.

Q. How long did you live within three or four miles of him after you gave him the deed?

A. After I gave him the deed I lived in Ashland until July 1st, '76. I gave him the deed in '75. I resided at Ashland until '76, and in July, '76, came down to the Cambria mine, and it was probably about two months after that when he came down to see me, and I gave him this note.

Q. How far was the Cambria mine from his residence?

A. Probably about three miles or three and a half.

Q. How long did you live there at the Cambria mine after giving him this note in '76.

A. I resided there, I presume, about six months, but I was hurt—blown up—in February, and was in bed for about two months.

Q. After your hurt where did you reside for the year following it?

A. I resided at the Pioneer mine.

Q. How far was that from Monroe's residence?

A. About the same distance, three miles or three and a half miles.

Q. Did you reside there up until '78?

A. No; I resided there part of '77. I went down to the Felch, I think, the latter part of '77. I guess it was in the spring of '78 that I went down there.

Q. That you went down to the Felch Mountain? Up to the time that you went down to the Felch Mountain was Monroe living near your place, within three or four miles?

A. No, sir; I don't think he was; he was out West at that time, I think.

Q. Do you remember when he went West?

A. I don't. I wouldn't be sure of the dates.

75 Q. Up to the time he went West he did reside there in your neighborhood?

A. Yes, sir; I think he did.

Q. At the time you made this settlement you have mentioned with Mrs. Monroe did you say anything to her about this title or about this land?

A. No, sir; not a word.

Q. Nothing of any kind?

A. Not that I remember of.

Q. Did you suppose she had given it up?

A. Well, I don't know; I expected her to say something about it;

she didn't say anything to me and I didn't to her; she wanted her money and I paid her.

Q. The land or the purchase were not mentioned in any way?

A. No, sir; not a word.

Q. Nor the deed given to Monroe?

A. No, sir.

Q. The subject was not touched upon at all between you?

A. No, sir.

Q. In the fall, toward Christmas, of 1876 were you at the house of Mr. Monroe when he and his wife were present and having a conversation about the land in this suit?

A. In the winter of '76?

Q. About Christmas time.

A. No, sir; I wasn't to their house in '76; I had no conversation in regard to the land, nor I wasn't to their house in '76.

Q. You were not to their house in the year '76 at all?

A. No, sir; I was not.

Q. Were you at their house in the year '77?

A. No, sir.

Q. In the year 1875?

A. I was at their house the time that the deed was made to him, and not since.

Q. You mean on the day the deed was made?

A. The day the deed was made? Yes, sir; I staid at his house most of the time he was at Marquette to get his money.

76 Q. The deed delivered at the same time?

A. It was delivered that evening.

Q. Do you know what day that was?

A. That evening or the next morning; I don't know which it was, but I think it was that evening; I went away on the train the next morning.

Q. The deed was made and delivered before you went away?

A. Yes, sir.

Q. Let me say, by way of reminding you, if it does remind you, don't you remember visiting Monroe's house very near Christmas time of 1876 and speaking to him about the land in question in this suit, expressing a high opinion of it and saying that you thought it would make you both rich, or something to that effect?

A. I know I didn't visit his house in '76, nor any time after the deed was made in '75.

Q. Do you remember what place you went to next after the delivery of the deed that you made to Monroe, if it was delivered in his house, where you went after leaving his house?

A. It wasn't delivered in his house; it was delivered, I think, in the justice's office.

Q. Do you remember the next place you went after you went out of the justice's office?

A. Yes, sir; after we went out of the justice's office we went into a saloon to wet the transaction, and I expect after that I went to the hotel.

Q. Was the note delivered at the same time in the justice's office that the deed was given?

A. Yes, sir.

Q. The deed was delivered by you to Monroe and Monroe delivered to you the note on the same day in the justice's office at the time, on the day when it was acknowledged?

A. Yes, sir; as near as I can remember; I am sure it was.

Q. At the time the deed of the land was made to your wife
77 did you have any knowledge that this land was valuable or more valuable than you thought when you entered it?

A. At the time the deed was delivered to my wife?

Q. Yes; or made to her?

A. No, sir; not any more.

Q. You then had the same idea as to the value of it that you had when you entered it?

A. Well, now, I guess I don't know. There was nothing done on that land at the time the land was entered. Of course there had been no developments on the land, but I think at the time the deed was made to my wife, I think there had been some clean ore found on section 15. There was no other value to the land, except that there was ore on the range.

Q. Which section 15?

A. The next section.

Q. There had been no additional value to it at that time, except what it had at the time you entered it?

A. No, sir.

Q. At what value did you put the land at the time? What did you consider it worth?

Objected to as irrelevant.

A. Well, that I couldn't tell; I don't know that I could. You mean the time the deed was given to my wife?

Q. The time it was made; yes.

A. I couldn't tell. I couldn't at the time put any value on it.

Q. Did you consider it worth more then than you did when you entered it?

A. Well, yes; I did consider it worth more. I wouldn't have sold for the same price I would then, for things were looking a good deal better; times were hard and nothing doing at the time it was entered. I know that I never made up my mind as to what it was worth or anything of that kind.

Q. Did you suppose when you made the settlement that you testified to with Monroe that that settlement put an end to his claims to title in the land?

A. Yes, sir; I did. He said so himself.

78 Q. You thought the deed was off in consequence of it?

A. Yes, sir; I didn't know then that I should ever get a deed, because I had spoken to Mr. McDonald and Mr. McKay about getting a deed and they always put me off.

Q. I refer to the matter of your giving Mr. Monroe a note.

A. He told me the deed was no good to him; that I hadn't got

any deed, and, consequently, he considered the matter settled when he should return the deed to me.

Q. Are you still of that opinion, Mr. Moore? Are you still of that opinion, that he ceased to have an interest or any claim upon the land in consequence of that settlement?

A. I am certainly of that opinion.

Q. And have you always been so?

A. Yes, sir; I have always been so.

Q. After being told by Mr. Monroe that he knew the note, the $240 note, was in the hands of the McKays, did you give the McKays any instructions to give it up to him?

A. No, sir; I think not; he told me that he knew it was there and could get it, and I didn't pay any more attention to it.

Q. Now, did you suppose that he could get your note, without any directions or leave from you, from the parties who held it?

A. Well, I supposed that he had had some conversations in regard to it with them and that they would return it to him; that matter I didn't pay any attention to; I was in trouble at the time.

Q. Where is Hansen, the man who had your note for collection?

A. I am inclined to think that he is dead; I think that some person told me that he died out West somewhere.

Q. Who was present, if anybody, besides you and Mr. Monroe when Mr. Monroe paid you this money, $150?

79 A. I don't know that there was anybody but Mr. Hansen; whether there was or not I couldn't say now.

Q. Who was present, if anybody, at the time he paid you the $10?

A. I can't say; I don't remember.

Q. Did you ever pay that $10 back as an independent sum?

A. No, sir; I did not. It was put in the note of $160. He said he wouldn't charge any interest.

Q. When did you first learn, if you ever did learn it, that Monroe got his note for $240 back?

A. The first that I knew was told me by Mr. McKay. He came down to Negaunee, I think it was, almost a year afterward; I wouldn't be sure of the time, but he came down to Negaunee to see me about a matter of some lands in Ashland.

Q. Well, the time?

A. I could not fix it; it must have been almost a year after the settlement.

Q. What year would that make it?

A. It would make it—I think it was in the fall of '77, but I wouldn't be sure.

Q. Did you ever see Monroe and talk with him on the subject of the note having been returned?

A. No, sir; not a word. I never talked with Monroe afterward; never seen him afterward, I don't think, with reference to that note.

Redirect examination by Mr. BALL:

Q. State whether Monroe ever gave you any other note aside from the one he gave you for that land interest.

Objected to as incompetent under the statute.

A. No, sir; he never did.

Q. State whether you ever gave Monroe any other note aside from the one you gave him for $160.

80 Same objection.

A. No, sir.

Q. From whom did you learn that Monroe had already got the note from McKay at the time he had the talk with you about getting it?

A. From Mr. and Mrs. McKay.

Objected to as incompetent and immaterial.

Q. When did they tell you that?

A. Since the suit was commenced.

Q. Do you remember the time, where, what occasion?

Same objection.

A. It was in their own house.

Q. At Ashland?

A. Yes, sir; I think about a year ago.

Q. Did you tell them when this conversation took place between you and Monroe?

Objected to as incompetent and immaterial.

A. Yes, sir. That is the reason they came to know. I was telling them about the matter. They said Mrs. Monroe had received the note early in the summer.

Mr. GRANT: What summer?

A. The summer of '76.

Q. What time in the year was it that you had the conversation with Monroe about this getting back the note?

A. It was either in September or October, and I am inclined to think it was early in October.

Q. Seventy-six?

A. Yes, sir.

Mr. CHADBOURNE:

Q. State where that conversation was had.

A. The conversation was had within one thousand feet of the Cambria-iron mine.

Q. You said it was where you were working on the side track?

A. Yes, sir; I was in a hurry to get into the mine with the track that evening.

Q. When did you first learn that the deed you had given Monroe was put on record?

81 Objected to as incompetent and immaterial.

A. I learned it in '79.

Q. In what way?

Same objection.

A. I learned it by getting an abstract from the abstract office. It was '79—'79 or '80. I forget. I have got the abstract.

Q. I will ask you now why you didn't ask Monroe during the time you both lived near each other to return you the deed or give you a quitclaim?

Objected to as incompetent and immaterial.

A. Well, sir, one reason was that I knew so little about the law that I thought I had made myself liable in giving that deed and didn't want to stir it up more than was necessary, and another thing I didn't wish to press it on account of the way I was paying the other note. I didn't want to go and urge him to deliver it while he was accommodating me, but the main thing was that I was ignorant of the law, and really thought I had got myself into trouble in giving the deed.

Q. Then you say you didn't want to urge him while you were owing him money?

A. Yes, sir.

Q. About how much of that note had you paid before Monroe went away?

A. I think about sixty dollars—fifty or sixty dollars—I wouldn't be sure.

Q. Did you see the note after he went away?

A. Oh, yes; on several occasions.

Q. Where was it?

A. Mr. Hansen had it.

Q. For collection?

A. Yes, sir; and when I would go and pay him he would indorse it on the note. I seen it several times.

Q. When you made the final settlement and paid the balance due to Mrs. Monroe had you any idea that she then made any claim to the lands?

Objected to as incompetent and immaterial.

82 A. No; I don't think that I did have any idea that she did—that is, I had nothing definite. I thought she might.

Q. Had she ever said anything about it to you?

A. No, sir; she hadn't said a word about it to me; not a word.

Q. And you say she said nothing about it during that transaction of paying the money?

A. Not a word.

Recross-examination by Mr. CHADBOURNE:

Q. Mr. Moore, if you thought you had laid yourself liable by giving this deed when you had no paper title yourself didn't you suppose that if Monroe gave you a deed back that it would relieve you from liability?

A. Yes, sir; of course.

Q. Why, then, did you not seek to relieve yourself by getting a deed back?

A. The reason was that the debt wasn't paid, and I didn't want to urge him until the money was paid up in full.

Q. Did you and Monroe have any other money transactions than these you have mentioned?

A. Not at all; no, sir; no money transactions whatever, more than what I have stated; none whatever.

Q. Why didn't Monroe pay the money on account of this land, and why didn't you insist that he should, instead of taking the course he was taking—the lands in suit?

A. At the time I sold them to him?

Q. Yes.

A. Well, we thought the other thing was so much more valuable and I shouldn't have sold him that if I hadn't been feeling pretty good over getting the money to enter the other lands. I thought we had a bigger fortune in the other land. I had the money
83 for the other lands, which I considered a great deal more valuable than the iron land.

Mr. BALL: Where were you when Monroe went away from this part of the country?

A. I am inclined to think that I was at the Felch Mountain.

Q. Did you know when he went away at the time?

A. No, I didn't; I didn't know anything about it; I have got the impression now that I must be there, from McKay and his wife telling me when he left there; I didn't know when he left there, but I must have been down to Felch Mountain.

Q. State whether you was ever paid any money for this land that you deeded to Monroe aside from the ten dollars which you paid back.

A. Not a dollar; no, sir; not a cent.

Same objection under the statute.

By CHADBOURNE: How much money did you pay Mrs. Monroe in settlement?

A. That I couldn't tell you, sir; I paid her the whole amount that was due on the note, with interest from the day it was given.

Q. That you have said. I want to know how much that was? Was anybody present when you paid Monroe or paid Hansen anything on that note, at the time when you paid Hansen or paid Monroe on account of that note?

A. No, sir; I don't know; there may have been parties present, but I don't know who they were or whether we could find them.

Q. You don't recollect anybody who was present?

A. No, sir; I think that I could find some of the old orders that was given them.

Q. Have you got any receipt-book stubs of the time when Monroe paid you this $150?

A. Of the time when he paid me the $150?

Q. Yes.

A. No, sir; if I gave him a receipt—I may have given him a receipt from some other.

84 Q. You say that McDonald and McKay and yourself talked about having a deed made of this interest to your wife; what talk did you and McDonald have on that subject?

Objected to as irrelevant.

A. Well, we were talking the matter over, and I told them about what Monroe had told me, that he didn't put the deed on record and that he would return it. In speaking of his death, Mr. McDonald knowing all the circumstances of the transaction, in talking the matter over, I think that one of them proposed that they should deed it to Mrs. Moore; I wouldn't be sure whether I spoke of it first or whether they did, but I am inclined to think that one of the others spoke of it first.

Q. Because of the outstanding deed?

A. Because of that. They knew that I had never been paid a cent for the land and knew that the other party was not entitled to it in any way.

Mr. GRANT: Latter part of answer objected to as irresponsive to the question and incompetent.

By Mr. BALL: You had at that time an abstract of title showing that the deed had been recorded?

A. Yes, sir.

WITNESS: I wish to add that Mr. McKay told me that I had better look out; that if Mrs. Crawford had any possible hold on me that she would do every possible thing that she could for to get that land.

Objected to as incompetent, immaterial, and irresponsive.

NAT. D. MOORE.

85 STATE OF MICHIGAN, } *ss:*
County of Houghton, }

I, Allen F. Rees, a notary public in and for the county of Houghton, Michigan, do hereby certify that on the 29th day of January, 1885, the testimony of James H. McDonald and Nathaniel D. Moore was taken before me in the cause pending in the circuit court for the county of Ontonagon, in chancery, wherein Christina Crawford and Mary Ann Monroe and John D. Monroe, by their next friend, Claudius B. Grant, are complainants and Nathaniel D. Moore and Helen Moore are defendants, on the part of the defendants, by stipulation between the parties, through their respective attorneys; that D. H. Ball, Esquire, appeared on behalf of the said defendants and T. L. Chadbourne and C. B. Grant on behalf of said complainants; that the said witnesses were by me sworn to testify the truth, the whole truth, and nothing but the truth; that the testimony of said witnesses was taken by me in short-hand and read over to the witnesses, and was afterwards reduced by me to writing, and that annexed hereto is the extension of said short-hand notes, which is a true transcript of the testimony of said witnesses so taken.

Witness my hand and official seal this 20th day of February, 1885.

[SEAL.] ALLEN F. REES,
Notary Public, Houghton County, Michigan.

86 *Further Proofs of Complainants.*

STATE OF MICHIGAN, } ss:
County of Houghton, }

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Depositions of Wm. D. McIntyre, Christina Crawford, and Daniel Crawford, taken July 23rd, 1885. Filed July 29th, 1885.

I, Allen F. Rees, a notary public in and for the county of Houghton and State of Michigan, do hereby certify that on the 23rd day of July, 1885, in accordance with the annexed stipulation, at the office of Chandler & Gray, in the village of Houghton, in said county, there appeared before me C. B. Grant, solicitor, and T. L. Chadbourne, of counsel, for said complainants, and Dan. H. Ball, solicitor for said defendants; and also there appeared William D. McIntyre, Christina Crawford, and Daniel Crawford, witnesses; that I took the testimony of the said witnesses, they having been first duly sworn, in short-hand; that afterward the said short-
87 hand notes were by me transcribed, and were then, to wit, on the 25th day of July, 1885, read over by me to the said witnesses; that the witnesses then and there, after having corrected their depositions, which corrections were by me noted in said depositions, subscribed the same; that the exhibits mentioned in said depositions were produced and by me marked as indicated, and are attached to said depositions; that said depositions so transcribed by me from said short-hand notes and signed by said witnesses and the said exhibits are hereunto annexed; that I am in no way interested in the result of said cause.

[SEAL.] ALLEN F. REES,
Notary Public, Houghton Co., Mich.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Cladius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

It is hereby stipulated in the above-entitled cause that the testimony of Daniel McIntyre, Christina Crawford, and Daniel Craw-

ford may be taken before Allen F. Rees, a notary public in
88 and for the county of Houghton, Michigan, a stenographer, on this 23rd day of July, 1885, and that their depositions when so taken shall be read in evidence upon the trial of said cause, subject to such objection as shall be noted in the taking of the depositions.

It is further stipulated that the defendants shall have the right to further cross-examine either or all of the above-named witnesses within thirty days from this date by giving five days' notice to the complainants' solicitors of the time and place of such cross-examination.

It is further stipulated that the complainants shall have ten days from this date within which to close their testimony-in-chief; that the defendants shall have twenty days thereafter in which to close their testimony, and that the complainants shall have ten days thereafter in which to put in rebutting testimony.

Dated July 23rd, 1885.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

89 In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Testimony taken upon stipulation before me, Allen F. Rees, a notary public in and for the county of Houghton, State of Michigan, on the 23d day of July, 1885.

Appearances: For complainants, C. B. Grant, solicitor, T. L. Chadbourne, of counsel; for defendants, Dan. H. Ball, their solicitor.

Depositions of William D. McIntyre, Christina Crawford, and Daniel Crawford, witnesses produced, sworn, and examined on the 23d day of July, 1885, at Houghton, in the county of Houghton and State of Michigan, in accordance with and by virtue of a stipulation hereto annexed signed by the solicitors for the respective parties, said depositions being taken on the part of the complainants, at the office of Chandler & Gray, in the village of Houghton, in said county.

[SEAL.] ALLEN F. REES,
Notary Public, Houghton County, Mich.

90 WILLIAM D. MCINTYRE, being first duly sworn, examined in chief by Mr. GRANT, testified as follows:

Q. Do you know James H. McDonald?
A. Yes, sir.

Q. John McKay?
A. Yes, sir.
Q. And Nathaniel D. Moore?
A. Yes, sir.
Q. How long have you known them?
A. I have known James McDonald since '63, and N. D. Moore since '63, and John McKay since '62.
Q. Where do you reside?
A. I reside in the Province of Ontario.
Q. Do you know the complainants in this case, Christina Crawford and her two children?
A. I do.
Q. How long have you known them?
A. I should think I ought to know my sister as soon as I knew anybody.
Q. Mrs. Crawford is your sister?
A. Yes, sir.
Q. Do you know the land described as the northeast quarter of section sixteen, town. forty-seven north, range forty-six west, in Ontonagon county, State of Michigan?
A. I never was on the property, but I hold an interest in the property.
Q. What is your interest in the property?
A. One-sixth.
Q. From whom did you purchase that one-sixth?
A. From John McKay.
Q. Did you furnish any money to McDonald and McKay for the purchase of this land?
A. I did.
Q. When?
A. In the winter of '75.
Q. Where?
A. Hancock.
Q. Can you tell what place in Hancock?
A. The Lake View House.
Q. Who was present then?
A. McDonald, Moore, McKay, and myself.
Q. How much money did you furnish them?
A. I can't tell that just now.
91 Q. Can you tell about how much?
A. I furnished all of it; I really think I furnished it all, but I wouldn't be certain of it.
Q. For what purpose did you furnish it?
A. For the purchase of this land. It was understood at the time that I was to have an interest in it.
Q. Who was to give you your interest?
A. McKay.
Q. Was anything said at that time in regard to Moore's interest in the land?
A. Yes, sir.
Q. What was it?

Mr. BALL: Objected to as incompetent, as oral evidence, and inadmissible on a claim to land.

Q. Go on. What arrangement was made?
A. There was an agreement drawn up between Moore, McDonald, and McKay.
Q. Did you see the agreement?
A. Yes, sir.
Q. Did you hear it read?
A. Yes, sir.
Q. Who wrote it?
A. Moore.
Q. Can you remember the substance of that agreement?
A. I can't remember the words of the agreement.
Q. State your recollection as to what the agreement was.

Mr. BALL: I object to that as incompetent.

A. That Moore was to have a third interest in the property.
Q. What was the consideration of his getting this third interest?
A. For his exploring and finding the property.
Q. Who was to go and enter the lands?
A. Moore.
Q. Who signed the agreement?
A. J. H. McDonald and McKay.
Q. Did Moore sign it?
A. I can't exactly tell you, as he was drawing it up—the writing; I can't remember of seeing his name. McDonald and McKay were sitting back, and they came up and signed their names.

92 Mr. BALL:

Q. You can't tell whether Moore signed or not?
A. I can't say for sure.
Q. What was done with the paper?
A. McDonald held the paper, as far as I can learn.
Q. Remember anything that was said by either of the parties at the time the parties were signing it?
A. I recollect McDonald, when he came to sign it, he sat over and said: "Let me put my dirty hand to that," he says.
Q. What is your recollection now as to what was done with the paper after it was signed?
A. I think that McDonald held the paper after it was signed, but I couldn't be certain whether it was Moore or McDonald. I know that McKay didn't get it.
Q. You know where Moore went after that?
A. Moore went away next morning.
Q. Did he state for what purpose he was going away?
A. For what purpose? There was an agreement drawn up that night and the money was paid over to Moore. There was so much money paid to Moore to be applied as the purchase-money on this land.
Q. And Moore was to go and enter the lands?

A. Enter the lands; yes, sir.
Q. Did you find that the lands had been entered afterward?
A. Yes, sir.
Q. Do you know at whose request that paper was drawn up?
A. I think it was a mutual agreement between them all.
Q. Had they agreed before drawing the paper what interest Moore was to have in the land?
A. Yes, sir; it was understood.
Q. Was there more than one paper drawn up?
A. I think that was all in my presence. There was two papers. There was this paper where Moore had received the money to be applied—that was one paper by itself—and there was this agreement where their interest was stated.
93 Q. Did you hear the paper drawn up and signed by Moore read?
A. Yes, sir; I heard all of it.
Q. What was the contents of that paper?

Mr. BALL: Objected to as incompetent.

A. It was a receipt that told how much money was received to apply on this school section, and described the land.
Q. How soon after that did you hear the lands had been entered?

Mr. BALL: Objected to as irrelevant.

A. When Moore got back.
Q. How long was he gone?
A. I couldn't say how long he was gone. I was on the Mineral Range road at the time. I couldn't tell how long he was gone.
Q. Can you tell about how long?
A. No, sir; I can't.
Q. How soon after that did you get your interest conveyed to you?

Mr. BALL: Objected to as irrelevant.

A. I wasn't in any hurry and trusted to my friend, and I let it go until a year ago last winter.
Q. Did you have a conversation with John McKay in regard to his agreeing to go over to the office of Chandler & Grant with Mr. Crawford and make a statement in regard to the interest of the heirs of John Monroe in this land?
A. I did have one.
Q. When was that conversation?
A. A year ago last winter.
Q. State what was said.

Mr. BALL: Objected to as irrelevant and incompetent and mere hearsay.

A. He said that he promised for to come over and state to the lawyers what he knew about it; and he went out to Calumet in the morning, and when he got back Mrs. Crawford had been up
94 to his place and told his wife that she was going to force him

to go over there, and he got vexed about it and wouldn't come; that is all I know about it.

Cross-examination by Mr. BALL:

Q. What month in 1875 was it that you furnished this money; was it in the early part of the year or the last of the year?

A. I think it was in the early part of the year.

Q. Do you recollect what month it was?

A. No, sir.

Q. Was there any one else present besides those you have named—yourself, Moore, McKay, and McDonald?

A. There might have been somebody else in, but I didn't take any notice of them; I didn't have any business with them.

Q. Did you furnish the money for McDonald's interest, or only for McKay's interest?

A. I furnished money for McDonald's interest.

Q. For both?

A. I don't know as I furnished it all; I furnished it for both.

Q. Do you know the amount?

A. I do not.

Q. McKay is your brother-in-law, is he not?

A. Yes, sir.

Q. You are a brother of McKay's wife, are you not?

A. Yes, sir.

Q. Where was this transaction—in what room of the Lake View House?

A. In the bar-room.

Q. Who was there attending the bar?

A. I couldn't tell you.

Q. Where was it done; on one of the tables or on the counter?

A. On a table.

Q. Who drew the writing?

A. N. D. Moore.

Q. You can't say whether Moore himself signed it or not?

A. I ain't certain. I think he did, but I don't recollect. He drew up the writing, and I didn't see it, but the rest all signed it.

95 Q. Moore, you say, gave a receipt for the money?

A. Yes, sir.

Q. Whom did he give the receipt to?

A. I can't remember whether it was to McKay or McDonald, but I think it was McDonald.

Q. Did it say that he received so much money from McKay and McDonald?

A. Yes, sir.

Q. To apply on the entry or purchase of this land?

A. Yes, sir.

Q. That, you say, was the night before he went to Lansing the next morning?

A. Yes, sir.

Q. How long did you remain with them that evening—with Moore and McDonald and McKay?

A. I remained there until the business was all transacted.
Q. Stay any longer?
A. No; McKay and I went home.
Q. You went home together?
A. Yes, sir.
Q. Were you living together at that time?
A. Yes; I stopped at his house.
Q. You were there as long as McKay?
A. Yes, sir.
Q. You don't know whether he went back again or not? You would know if he did, would you not?
A. Yes, sir; I think I would have known if he had.
Q. What time did you go to that meeting?
A. The train came in about twenty-five minutes after six, and we took tea at McKay's, and went over to the Lake View House with him and staid there as long as he staid.
Q. Do you know where they got the paper and ink to write with?
A. They got it at the Lake View.
Q. Do you know who they went to? Did you see them go to anybody or anywhere for it?
A. I couldn't tell. I suppose they went to somebody.
Q. Did you receive any paper or receipt or anything of that kind?
A. No.
96 Q. The only agreement you had, then, was just by verbal promise from John McKay?
A. Verbal promise was all I had.
Q. Are you sure that either Moore or McDonald kept that paper you speak of, or might it have been given to somebody else to keep?
A. Moore didn't keep it.
Q. Moore didn't keep it?
A. I couldn't tell which of the three parties kept it.
Q. Are you sure they didn't hand it to somebody else to keep for them?
A. Not while I was there. I know the paper was drew up and signed.
Q. Did you go away leaving McDonald and Moore there at the time?
A. Yes, sir.
Q. Then you mean that you didn't see who did take the paper afterward?
A. I don't know which of them took the paper, but Moore's interest was mentioned in the agreement.

Mr. GRANT: Did you get a receipt from McKay for the money you advanced at the time, or from McDonald?
A. I did not. I didn't ask them.

In reply to the question "What was done with the paper?" on page 4, witness desires to correct his testimony and answer as follows:
"Moore held the paper."

Witness desires to have this correction apply to all questions on that point.

Witness says: "I must have misunderstood the question at the time."

W. D. McINTYRE.

Sworn to and subscribed before me this 23d day of July, 1885.

ALLEN F. REES,
Notary Public.

97 CHRISTINA CRAWFORD, being first duly sworn, examined in chief by Mr. GRANT, testified as follows:

Q. Where do you reside?
A. In Hancock.
Q. How long have you lived there?
A. I came there in '81, or rather in '82, I guess.
Q. You were formerly the wife of John Monroe, deceased?
A. Yes, sir.
Q. And are the mother of the other two complainants?
A. Yes, sir.
Q. Do you know John McKay and Jane McKay?
A. Yes, sir.
Q. Jane McKay is your sister?
A. Yes, sir.
Q. When did your husband die—John Monroe?
A. August 17th; I don't know what year; August 16th, 1878.
Q. Where did he die?
A. In Colorado.
Q. When did he go to Colorado?
A. In July, the same year.
Q. Prior to that time where had you and he lived?
A. We lived at Ishpeming, Marquette county.
Q. How long had you lived there?
A. We live- there eight or nine years; probably more.
Q. What was your husband's business?
A. He was a blacksmith.
Q. Do you know Nathaniel D. Moore, one of the defendants?
A. Slightly.
Q. Did you know him when you were living at Ishpeming?
A. I have seen him there; I can't say I knew much of him.
Q. I show you a paper which reads as follows:

98 "$240. ISHPEMING, MICH., *November 1st*, 1875.

One year after date I promise to pay Nat. D. Moore, or order, the sum of two hundred and forty dollars ($240.00), for value received.

JOHN MONROE."

Q. Is this paper your husband's signature?
A. It looks like his handwriting.

Paper offered in evidence by Mr. Grant and marked Exhibit B, and is hereto annexed.

Q. When did you first see this note?
A. When I came to Hancock—at Mrs. McKay's.
Q. About what time was that?
A. It was the summer after we bought the land from Mr. Moore; in July month it was.
Q. In '76, I suppose?
A. Yes, sir.
Q. What, if anything, had you known about this note prior to that time?
A. Nothing.
Q. Did you know, prior to that time, that your husband had given Mr. Moore any such note?
A. No, sir.
Q. For what purpose was you up here in that summer?
A. My folks went to Calumet and I came up to visit them; they spoke of going to Canada and I came up to see them.
Q. What folks did you have living here then?
A. My father and mother and also my two brothers.
Q. Where were John and Jane McKay living at that time?
A. In Hancock.
Q. Did you come to see them also?
A. I had to remain over night here always, and I stopped to their house.
99 Q. Was that going out or coming back from Calumet?
A. The boat came in here late and I had to stay there over night.
Q. That was going out?
A. Yes, sir.
Q. State the circumstances under which you saw this note there.
A. The next morning Mrs. McKay told me there is a note here of ours, she said. I told her to let me see it, and she went and got it and gave it to me.
Q. What did she say about it?
A. She told me to take it home with me and take care of it.
Q. Did she state the circumstances under which it was left there with her?
A. She said William McKay left it there, and she told me to take care of it in case it was asked for by William McKay and I should have to produce it.
Q. Have you kept the note ever since?
A. Yes, sir.
Q. Has Mrs. McKay or any one else ever asked you for the note from that time?
A. No, sir.
Q. Mrs. McKay testifies that you told her at that time that your husband, Mr. Monroe, wanted you to go and get the note; that he hadn't time to do it?
A. No, sir.

Q. Did you tell her any such thing as that?

A. No, sir; I didn't know she had it.

Q. She further says that you told her that Mr. McKay had notified you and your husband that Mr. Moore had no claim to the land, and you said it was worthless anyway. Did you say anything of that kind?

A. No, sir; I always understood the land was valuable.

Q. She says that she refused to give you the note.

A. No, sir; she got it right away and gave it to me.

Q. She further testifies that you said that Mr. Monroe wanted the note, and that when she refused to give it to you you cried and felt bad about it. Is that so?

A. No, sir.

100 Q. She says you told her that Mr. Moore had no title to the land. Did you tell her that?

A. No, sir; Mr. Moore told me he had a deed of the land, and also my husband.

Q. She further testifies that you said to her, "You have got the note now, and they (meaning your husband and Mr. Moore) are square and Mr. Moore could keep his land." Did you tell her that?

A. No, sir.

Q. Who was present at that conversation when the note was given to you by Mr. McKay?

A. No one.

Q. Was Mr. McKay present?

A. No, sir.

Q. Do you know where he was?

A. He was at his work as far as I know.

Q. Mrs. McKay further testifies that when you got the note you felt a good deal better, but allowed it didn't make much difference whether you got the note or not, because you intended to keep Mr. Monroe in debt in the store while he remained on Lake Superior, so that it would be impossible for Moore or any one else to even collect a dollar of it, but now that you had the note the land was worthless, and he was square and he could keep the land. Did you say anything like that?

A. No, sir.

Q. Do you know anything about what this note was given for?

A. No, sir.

Q. Did you ask Mrs. McKay at that time what the note was given for?

A. No, sir; I did not.

Q. Was there any conversation between you and her as to what the note was given for?

A. No, sir; all I asked was, I asked her what was the note; was it for us to pay money or not, and she said it was for us to pay the note, and then I said I knew nothing about it.

Q. Did you have a conversation with John McKay in Hancock in July, 1881, about this land?

A. Yes, sir.

101 Q. Where was it?

A. At his own house.
Q. Had you shown him the deed?
A. Yes, sir.
Q. For what purpose did you show him the deed?
A. Well, I wished to know whether it was the exact place or not, as I never had any way to be sure whether this was the section as I always understood it to be; so by comparing deeds with his deed it would explain it.
Q. What did he say to you about it?

Mr. BALL: Objected to as irrelevant and hearsay.

A. He said that I was well fixed; that I was as well off as he was; that I had the same interest that he had.
Q. Did he say anything in that conversation about the taxes upon the land?
A. Yes, sir.
Q. What did he say about them?

Mr. BALL: Same objection.

A. I asked Mr. McKay if Mr. Moore spoke to him about my interest, and said I suppose he would be delighted to tell me the good news; and he said Mr. Moore never said anything about it, but I shouldn't ask him about it when he came down; Mr. McKay said there was a back tax on the land, and supposed Mr. Moore would look to me to pay my part of the taxes. I took McKay's advice, and did not speak to Mr. Moore, and told him I was willing to do what was right in regard to the back taxes.
Q. Did he say anything to you at that time about when it would be time enough to speak of your interest?

Mr. BALL: Objected to as incompetent and hearsay.

A. Yes, sir; he said it would be time enough to speak of my interest when it would be sure the property was proven up as they would wish it to.
Q. Was Mr. Moore here at that time or at any time afterward?
A. He was here after that.
102 Q. Did you see him here?
A. Yes, sir.
Q. Where?
A. At Mr. McKay's.
Q. After he was here did Mrs. McKay say anything to you about your interest in the land?
A. Yes, sir.
Q. How soon after Moore was here was that?
A. It was just after he went away; the same evening that he went.
Q. What did she say?

Mr. BALL: Objected to as incompetent and hearsay.

A. She told me that she asked Mr. Moore if Mr. Monroe didn't buy this land or have some dealing in this land, and Mr. Moore said

no; that he made out a paper for Mr. Monroe; that it was a mere paper and not a deed, and didn't amount to anything.

Q. When did you first learn that Mr. Moore disputed the interest of yourself and your children in this land?

Mr. BALL: Objected to as irrelevant.

A. Then.

Q. About what time was that?

A. It was in the summer of '81—July, I believe.

Q. Had you heard anything of the kind prior to your husband's death?

A. No, sir.

Q. Did Mr. or Mrs. McKay, at that time, say anything about a deed being made out to Moore by McDonald and McKay?

Mr. BALL: Objected to as incompetent and hearsay.

A. Mrs. McKay told me of it several times.

Q. What did she say about it?

A. She told me there was a deed made out to them, and all signed it but her, and she said she never did sign it.

Q. Did she state the reason why?

A. She gave various reasons.

Mr. BALL: Same objection.

103 Q. What were they?

Mr. BALL: Same objection.

A. She said Mr. Moore was in debt to them; that was one reason; and, another reason, he had been there several times and made her trouble, and she wasn't going to sign the deed.

Q. Mr. McKay says that he wrote your husband, John Monroe, once that Moore had no claim on the property; did you ever see any such letter written to your husband?

A. No, sir.

Q. How familiar were you with your husband's correspondence?

A. Well, I always read the mail as it came into the house.

Q. Mr. McKay testifies that after you went to Canada he wrote to you that he thought you had no right to the property, because you had got the note back; did he write anything of that kind to you?

A. No, sir.

Q. When were you married to Mr. Crawford?

A. In the fall of '81.

Q. Did you have a conversation with Mr. McKay or Mrs. McKay after that in regard to this land?

A. Yes, sir.

Q. Where was it and when was it?

A. At their own house, in January month, I think, of '82.

Q. What was said?

Mr. BALL: Objected to as incompetent and irrelevant and hearsay.

A. There was several things said; I don't remember exactly.

Q. What was said in substance?

A. They spoke of the land and of the deed, and Mr. McKay said there was a deed made out to Mr. Moore, and said that he thought that it was Mr. Viele that made out the deed; he didn't know where it was then.

Q. At that time did he say anything about your interest in the land being good or bad?

104 Mr. BALL: Objected to as incompetent and hearsay.

A. Yes, sir.

Q. What was it?

A. He said that I held the same interest as he did, and that the land was excellent, good.

Q. Where did Moore live at the time you and your husband lived at Ishpeming, any of the time?

A. Well, I think he came from Ashland when we bought the land of him; he came from up that way, anyhow; whether he came from Ashland or Hancock I couldn't say. I don't know as I asked him.

Q. How often do you remember Mr. Moore's being at your house while at Ishpeming?

A. I remember his being there once, and he might have been there more times than that, but I don't remember so well as I do that time.

Q. When was that?

A. That was a little before Christmas. I don't remember what month, but two or three weeks before Christmas in '76.

Q. Was there a conversation then between your husband and Mr. Moore about this land?

A. Yes, sir.

Q. What was it?

Mr. BALL: Objected to as incompetent, as Mr. Moore's statements are only hearsay as against the defendant, Helen Moore, and incompetent to affect her interest.

A. Mr. Moore told my husband that he had been the means of making a good many men rich, and now that he had made him rich that this was the best investment that he had ever made.

Q. Was you present at any conversation about the time of this purchase between your husband and Mr. Moore?

A. Well, I heard them speak of it frequently, the time it was bought, before they drew up the deed, as being valuable.

105 Q. Now, was you present when any ten dollars was paid by your husband to Moore?

A. Yes, sir.

Q. Where was that?

A. In Ishpeming, at the New York mine.

Q. About what time was that?

A. It was just when they were getting ready to go to town to have the deed drawn?

Q. How long had Mr. Moore been there at that time?

A. He staid there one night.

Q. State the circumstances about the payment of the ten dollars and what was said, if you remember.

A. He told my husband that he would like to get ten dollars, as he had no money, before they went down-town, as he wanted it to treat the boys, and hadn't any; so my husband came in and told me, and I got the money and gave it to my husband, and he went out and gave it to Mr. Moore, and I went out with him to the kitchen part of the house.

Q. What did they do after that?

A. I asked Mr. Moore if he had a deed of the place and he said yes, but he hadn't it with him; so they went down-town then.

Q. Was there anything said in that conversation about Moore's charging Monroe more for his interest than McKay charged your brother for his interest?

A. Yes, sir.

Q. State what it was.

A. Mr. Monroe said to Mr. Moore that he thought he was charging him more that what McKay charged my brother for the same interest, and Mr. Moore said he wouldn't sell at all if he had any money; he said he hadn't one cent.

Witness shown deed from N. D. Moore to John Monroe, marked Exhibit A.

Q. How long have you had that deed?

A. Ever since it was drawn up.

Q. Has it been in your hands under your and your husband's care up to his death?

A. Yes, sir.

106 Q. Since his death you have had charge of it?

A. Yes, sir.

Q. At the time your husband went away did he say anything to you about this deed?

Mr. BALL: Objected to as incompetent.

A. Yes, sir.

Q. What did he say when he went away from Ishpeming to Colorado?

A. We moved from here to Canada, and then we went from Canada to Colorado.

Q. Before he went away at that time what did he say to you about this deed?

A. He told me for to take good care of it; that that property would come good to me and the children some day.

Q. You were the administratrix of your husband's estate; you were appointed administratrix of your husband's estate?

A. No, sir.

Q. There has been none?

A. No, sir.

Q. There was no administrator ever appointed on your husband's estate?

A. No, sir.

Q. Mr. Moore has testified in regard to the payment of the note that was given to your husband in his lifetime; did you find a note against him in your husband's papers?

A. Yes, sir.

Q. Did you know anything about what it was given for?

A. No; I don't know what it was given for.

Q. He paid you a balance on that note, did he?

A. Yes, sir.

Q. Do you know what the amount of the note was now?

A. As near as I can remember it was sixty dollars.

Q. Was that the full amount of the note, or was that the balance that Moore paid?

Mr. BALL: Objected to as incompetent.

A. I couldn't say whether that was the full amount of the note or whether there was something paid besides.

107 Q. The note was given up at the time of the payment?

A. Yes, sir.

Q. At that time was anything said between you and Mr. Moore in regard to the interest in these lands?

A. No, sir.

Q. No reference was made to it by either party?

A. No, sir.

Q. Why did you say nothing to him about the interest in the lands at that time, if you had any reason?

Mr. BALL: Objected to as irrelevant.

A. Mr. McKay told me I shouldn't say anything to him, and I took his advice and didn't speak to him.

Mr. BALL: Objected to further because it is incompetent.

Cross-examination by Mr. BALL:

Q. You say you never saw or knew anything of this $240 note until you saw it at Mrs. McKay's?

A. No, sir.

Q. Until she told you that they had it?

A. Yes, sir.

Q. That was in what month?

A. In July month, 1876.

Q. You say, then, that your husband did not request you to go and get it?

A. No, sir.

Q. You knew that your husband had paid this ten dollars towards the land?

A. Yes, sir.

Q. Did you ever understand that he paid the balance of the money?

A. Yes, sir.

Q. You were not present when the money was paid?

A. I was not present when any money was paid, except this ten dollars.

Q. You didn't know that he gave this note for the purchase-money?

A. I didn't know anything about it.

108 Q. Did you know that he had given any note before you saw it there?

A. No, sir.

Q. You got this note when you were on your way to Calumet, and not on your way home?

A. Yes, sir.

Q. Did you take the note right home with you when you went?

A. Yes, sir.

Q. How long after you got the note before you went home?

A. I staid out there about a week.

Q. What did you do with the note when you got home?

A. I took care of it, as she told me to.

Q. Where did you put it?

A. I put it in the drawer where we kept our papers then.

Q. Did you show it to your husband?

A. Yes, sir.

Q. Showed it to him when you first got home, did you?

A. Yes, sir.

Q. Did you ever say anything to Mr. Moore about having the note?

A. No, sir.

Q. Didn't tell him you had it, or anything of that kind?

A. Never said a word about it to him.

Q. Nor William McKay?

A. I never seen William McKay.

Q. Did you know William McKay?

A. I seen him several times. I was slightly acquainted with him.

Q. She told you that if he called for it you would have to give it to him?

A. She told me that if William McKay ever called for it I would have to produce it.

Q. Did he ever call for it?

A. No, sir.

Q. Did your husband tell you what that note was given for?

A. No, sir.

Q. Did he tell you to return it?

A. No, sir.

Q. Give you any instructions at all about it?

A. No; nothing more than he said to put it by.

Q. You say that he didn't even then tell you what it was for?

A. No; nor I didn't ask him.

109 Q. Was that in the evening or in the morning that Mrs. McKay gave you this note?

A. It was in the forenoon—some time in the forenoon.

Q. What time did you go out to Calumet?

A. If I recollect right I went out on the noon train.

Q. Anybody else present besides you and Mrs. McKay?
A. No, sir.
Q. Where was it—in their sitting-room over there?
A. In their dining-room.
Q. Did McKay say anything to you about how much back taxes were on the land when you had a talk about it?
A. No, sir.
Q. If you said anything about it Moore would require you to pay it?
A. Yes, sir.
Q. He told you to wait and see how it would come out?
A. He said it would be time enough when it was proved up.
Q. Did you know at this time that the land hadn't been paid for?
A. No, sir.
Q. That Mr. Monroe hadn't paid the full price for the land?
A. I never understood that Mr. Monroe didn't pay for it.
Q. You came from Canada back to Hancock, I understood you, in the early part of the year 1882?
A. Yes, sir.
Q. You say your husband was out in Colorado?
A. Yes, sir.
Q. You were there, I suppose?
A. No, sir; I was not there.
Q. From the time you went from Ishpeming to Canada did you live there during that whole time?
A. I was back here on a visit for a little while.
Q. You lived there, then, during the whole time?
A. Yes, sir.
Q. At what town?
A. Our town was Avison.
Q. The same place where Mr. McIntyre lived?
A. Yes, sir.
110 Q. Did you not learn while you lived there that Mr. Moore or Mrs. Moore, or somebody, disputed your right to this land?
A. No, sir.
Q. Did you go to any lawyer there and consult about this matter?
A. Yes; but that was after I had visited here and Mr. Moore had this conversation with my sister.
Q. That was before you moved back here, then?
A. Yes, sir; Mr. McKay told me I should hire a lawyer or attorney.
Q. When was that?
A. In the fall of '81.
Q. You were up here that summer?
A. That summer I was up here.
Q. That was the time you learned about it?
A. Yes, sir.
Q. And when you went back there you hired a lawyer?
A. Not in Canada. I knew the Canadian laws didn't correspond with the State laws, and I came to Port Huron and seen a lawyer.

Q. Then you didn't go to any lawyer in Canada about it?
A. No, sir.
Q. Was that before your marriage to Mr. Crawford or afterward?
A. Before.
Q. How long before?
A. I couldn't say; probably five or six months before.
Q. That you went to this lawyer in Port Huron?
A. Yes; maybe not so long; maybe longer.
Q. How did Moore come to go to your house a little before Christmas, as you say, in 1876?
A. He was going to work for Mr. McDonald, I heard, and he came to visit us, as far as I know.
Q. What time of day did he come there?
A. I ain't sure whether it was forenoon or afternoon.
Q. How long did he stay?
A. About an hour or so; not longer, I think.
Q. You had seen him before?
A. Yes, sir.
Q. Was it in the presence of your husband that he said he had made you both rich, and that was the best investment he had ever made?
A. Yes, sir.
111 Q. You can't say how long that was before Christmas?
A. I can't say exactly, but I know it was shortly before, because we invited him to come and spend Christmas with us.
Q. Was he ever in your house before that?
A. I don't know that he was; I don't remember particularly about that.
Q. You say he came to your house about the time of making this deed to Mr. Monroe?
A. Yes, sir.
Q. Was the sale talked over there at the time between Mr. Moore and your husband?
A. Yes, sir.
Q. In your presence; did you hear it?
A. Yes, sir.
Q. Did you hear anything said as to what the price was to be?
A. I suppose I have, but I don't remember exactly what the price was.
Q. Did you understand that this ten dollars was to be paid upon it?
A. Yes, sir.
—. Did you hear anything said as to when or how the rest was to be paid?
A. No; I didn't.
Q. How long was Mr. Moore there at that time?
A. He was there over night; he staid over night at our place that time.
Q. Was it in the evening or next morning, that talk about the lands?
A. They talked about it both in the evening and the morning.

Q. Did they stay there all the evening, or did they go down-town that evening?

A. They were down-town the first evening he came there; they went down-town for awhile.

Q. Was the deed drawn up that evening?

A. No, sir; I think it was drawn up the next day.

Q. The deed was not drawn up at the house?

A. No, sir; down-town.

Q. When did you first see the deed?

A. I think it was the day after it was drawn that he brought it home.

112 Q. Was that note, Moore's note, among your husband's papers when he died, or was it in the hands of a justice in Ishpeming?

A. A justice in Ishpeming had it when my husband died.

Q. Do you recollect his name?

A. Hansen.

Q. Do you recollect, as a matter of fact, that something had been paid on it before your husband died?

A. No; I didn't know whether there was anything paid on it.

Q. Did you notice whether there was any endorsements on it?

A. No, sir; there was not.

Q. When did you first see it—when you went with Moore to get it?

A. No, sir; I had seen it before that.

Q. Seen it in Hansen's hands?

A. No, sir; I didn't see it there.

Q. Saw it before that?

A. Yes, sir.

Q. You say you and Moore went together there to get it and settle it up?

A. Yes, sir.

Q. You say it amounted to about sixty dollars?

A. As near as I know.

Q. That is, that he paid you that?

A. Yes, sir.

Q. Did you know what that note was for?

A. Well, I wasn't present when that note was drawn, but all I know about it was my husband told me it was on lent money which he loaned Mr. Moore.

Q. Did you know of your husband giving Moore any money to enter land with?

A. I don't know of that; I know of his loaning Mr. Moore money.

Q. This two hundred and forty dollar note you still held in your possession at the time Mr. Moore paid you this money?

A Yes, sir.

Q. Nothing was said between you about that note at the time?

A. Nothing at all.

Q. Did you come up to see Mr. Moore to have him pay you; did you come after the money?

A. Yes, sir.

113 Q. Who figured up the amount due when Mr. Moore paid you the balance?

A. Well, I don't know that any one figured it up. Mr. Hansen claimed that he got so much money. I think he said he got five dollars one time and three dollars one time and three dollars another time when he went after it.

Q. That he had collected of Mr. Moore on the note?

A. Yes, sir.

Redirect examination by Mr. GRANT:

Q. I call your attention to one thing, Mrs. Crawford. In the conversation with Mrs. McKay about this note, when she gave it to you, did she say anything about the note having been given by Moore to William McKay for wages?

Mr. BALL: Objected to as incompetent.

A. Yes; she did.

Q. What did she say?

A. That was about all she said; that the note was given to Mr. McKay for wages; and I asked why McKay didn't come for the money, as he knew we were worth it, and she said William didn't know if we received value for it; that Moore didn't tell the truth at times; all he said——

Witness desires to add to her testimony as follows: "I came up here to visit my parents in 1876, before the 4th of July. I was here on the 4th of July."

In reply to the question, in the middle of page 23, "Did you know anything about what it was given for?" witness says: "When I answered that question I thought it referred to the $240 note. This note was given for money borrowed from my husband by Moore, as my husband told me."

CHRISTINA CRAWFORD.

Sworn to and subscribed before me this 23d day of July, 1885.

ALLEN F. REES,
Notary Public.

114 DANIEL CRAWFORD, being first duly sworn, examined in chief by Mr. GRANT, testified as follows:

Q. You are the husband of the complainant, Christina Crawford?

A. Yes, sir.

Q. When were you married to her?

A. December, 1881.

Q. Do you know John McKay and Jane McKay?

A. Yes, sir.

Q. How long have you known them?

A. Well, I couldn't go back exactly to when I have known them; it was a great many years. I guess since they first came to Hancock to live.

Q. Did you have a conversation with Mr. and Mrs. McKay in '82 in regard — this land?

A. Yes, sir.

Q. When and where was it?

A. It was at their house in Hancock; about the fourth—somewhere in the vicinity of the fourth—of January.

Q. Who was present?

A. Mr. and Mrs. McKay and Mrs. Crawford.

Q. State the conversation that took place.

Mr. BALL: Objected to as incompetent and hearsay.

A. I went there for the purpose of ascertaining from Mr. and Mrs. McKay what they knew of this matter. I asked Mr. McKay if he ever gave a deed—if there was ever a deed drawn up by him and Mr. McDonald to be given to Moore in regard to this land in question. He told me that there was; there was a deed drawn up in Mr. Viele's office at the railroad; he thought Mr. Viele drew it up, but he wasn't there at the time, and that the deed was drawn up there and signed by all parties—himself, Mr. McDonald, and Mrs. McDonald, but his wife hadn't signed it. I asked her why she hadn't signed it. She gave me the reason that there was
115 quite a number of young men in the railroad office, and she was delicate about going in among the men; that is the reason she gave me. I asked Mr. McKay if that deed had ever been delivered to Mr. Moore. He said he didn't know; he thought it was lost; his best recollection was that he hadn't received it; he couldn't tell. He told me there was some trouble between Mr. McDonald and Mr. Moore; that Moore owed McDonald, and that Mr. Viele was to keep it until Moore paid Mr. McDonald, and afterward he understood it was settled.

Q. Anything else at that time?

A. I asked him if he would be willing to go over here and make that statement to the lawyers that we had employed, Mr. Grant and Mr. Chadbourne—make the same statement to them as he did to me. He said that he was perfectly willing to do so. They were the facts as he had given them to me, and he would go and state them to the lawyers.

Q. Anything said in that conversation about the interest of those complainants in this land?

Mr. BALL: Same objection.

A. Yes; he said that he saw by Mrs. Crawford's deed that she had a deed of a sixth of the same property that he owned; he saw by looking at the deed from Moore to John Monroe. He said that by looking at the deed it was the same interest in the same property. I told him that we proposed to get it, and he said all right; go ahead.

Q. Did you see him again about coming over here?

A. I think it was Monday afternoon. This conversation was on Sunday, I believe. I received a letter from Mr. McKay; I could not produce it; it was abusive——

Mr. BALL: Objected to for the additional reason that the writing itself is the best evidence.

—stating that Mrs. Crawford had been over and abused him
116 to his wife, and that he wouldn't come, and that he would do the most he could to hurt us in the suit.

Q. Have you got that letter?

A. I think it is over to the house.

Q. I wish you would look for it and produce it this afternoon. Did you have a conversation with Mrs. McKay at any other time in regard to this?

A. Yes, sir.

Q. When and where was it?

A. It was in their house in Hancock, in July, '81.

Q. What particular place at the house was it?

A. Right in front of their house. I was passing the house and she came out, and came on the hop-skip-and-a-jump, and stopped me.

Q. State what the conversation was.

Mr. BALL: Objected to as incompetent and hearsay.

Q. In that conversation, Mr. Crawford, state whether or not in that conversation Mrs. McKay said to you in substance as follows: Mrs. Monroe is well fixed, because she owns as much interest in that land as I or I and my husband.

A. Yes; that is correct.

Q. Do you know this William McKay who is reported to have brought this note to Mr. and Mrs. John McKay?

A. I have seen him, but I have no acquaintance with him.

Q. Have you made efforts to ascertain where he is?

A. Yes; I have written two or three times to him.

Q. Where have you learned where he is?

A. It is in Minto, Dakota Territory. I heard that he had received my letter.

Q. Did you write to him in regard to this matter?

A. Yes, sir.

Q. Did you ever receive any answer from him?

A. No, sir.

Q. What is his address?

A. Minto P. O., Grand Forks county, Dakota.

117 Q. Have letters ever been returned to you that you sent to him?

A. No, sir.

Q. How long ago was it that you wrote?

A. I don't know when the last one was; it was quite awhile ago when I wrote the last one; I gave it up then. I heard from some of them that he received my letters, but he didn't reply to them.

Q. It was some months ago?

A. Yes; some months; I guess six months ago.

Witness adds: "My letters to William McKay were enclosed in envelopes, with the following request printed on the outside: 'If

not delivered in ten days return to D. Crawford, Hancock, Michigan.'"

Witness adds: "I have looked for the letter referred to in my testimony—the letter from John McKay—and have been unable to find it. I have searched thoroughly among all my papers."

DANIEL CRAWFORD.

Sworn to and subscribed before me this 23rd day of July, 1885.

ALLEN F. REES,
Notary Public, Houghton County, Michigan.

Mr. GRANT: I offer in evidence certified abstract of the title to the land in question.

Mr. BALL: Objected to as incompetent.

Abstract produced and marked Exhibit C, and is hereto annexed.

118 "EXHIBIT 'B.'

$240. ISHPEMING, MICH., *November 1st*, 1875.

One year after date I promise to pay Nat. D. Moore, or order, the sum of two hundred and forty dollars ($240.00), for value received.

JOHN MONROE."

ABSTRACT OF TITLE, ETC.

118a *Abstract of Title to N. E. ¼ of Section No. 16, in Township*

No.	Grantor.	Grantee.	Subdivision of section.	Sec.	Town.	Range.
1	State of Michigan---	James H. McDonald and John McKay, of Houghton Co., Mich.	N. E. ¼ of -----	16	47	46
2	James H. McDonald, of Escanaba, Mich., and John McKay, of Hancock, Mich.	Helen Moore, of Negaunee, Mich.	Undivided ⅓ of N. E. ¼	16	47	46
3	Eliza S. McDonald, of Escanaba, Mich., and Jane McKay, of Hancock, Mich.	Helen Moore, of Negaunee, Mich.	Undivided ⅓ of N. E. ¼ of	16	47	46
4	Nat. D. Moore, of Ashland, Wis.	John Monroe, of Ishpening, Mich.	Undivided ⅛ of N. E. ¼ of	16	47	46
5	Auditor General of Michigan.	Frederick Ayer, of Lowell Mass.	N. E. ¼ of -----	16	47	46
	For taxes of 1875, 1876, & 1877.					
6	Frederick Ayer, of Lowell, Mass.	James H. McDonald, Delta Co., Mich.	N. E. ¼ of -----	16	47	46
7	Richard Langford, of Rockland, Ontonagon Co., Mich.	Cornelia Gilles, of Stillwater, Minnesota.	----------	---	---	---
	Power of attorney.—Giving full power to sell and convey any interest which party of the first part is or may hereinafter become entitled in sections 15 & 16, town. 47 N., of range 46 west, or any portion of the same.					
8	Christina Crawford, Mary Ann Monroe, and John D. Monroe, by Claudius B. Grant, complainants,	*vs.* Nat. D. Moore and Helen Moore, defendants.	Undivided ⅛ of N. E. ¼ of	16	47	46
9	James H. McDonald, John McKay, and Helen Moore, wife of Nathaniel D. Moore, her attorney-in-fact, of Ashland, Wis.	Charles S. Colley, Milwaukee, Wisconsin.	N. E. ¼ of -----	16	47	46
	Agreement in which parties of first part bind themselves to execute and deliver to party of second part a certain mining lease, copy of which is attached to instrument, upon payment to them of the full sum of $30,000.00 by said party of second part.					
10	John McKay and Jane, his wife, of Ashland Co., Wisconsin.	William D. McIntyre.	Undivided ⅛ of N. E. ¼ of	16	47	46
11	James H. McDonald and Eliza S., his wife, of Escanaba, Mich.	Helen Moore, Ashland, Wisconsin.	Undivided ⅓ of N. E. ¼ of	16	47	46
	The intent and purpose of this conveyance being to perfect the title of said Helen Moore in and to the undivided ⅓ interest in said parcel of land heretofore deeded to her by said James H. McDonald and John McKay by deed dated Dec. 16, '80, and recorded in the office of the register of deed- for said county of Ontonagon, in Liber " L," at page 487.					

47 *North, of Range No.* 46, *in Ontonagon County, Mich.*

Acres.	100th.	Kind of deed.	Date of deed.	Considera-tion.	Date of record.	Liber.	Folio.
160	----	Patent-------	Jan'y 28, '75	$640	Jan'y 28, '82	"M"	298
------	----	Q. D.--------	Dec. 16, '80	1 00	Mar. 14, '81	"L"	486
------	----	Q. D.--------	Jan'y 28, '81	1 00	Mar. 14, '81	"L"	487
------	----	W. D.--------	Oct. 18, '75	250	Dec. 20, '75	"K"	105
160	----	Tax---------	June 7, '80	48 49	June 22, '80	"F"	337
160		Q. D.--------	Oct. 1, '81	200	Nov. 27, '81	"M"	181
------	----	----------	Oct. 28, '81	----------	Oct. 28, '81	"M"	105
------	----	Notice of *lis pendens.*	----------	----------	Feb'y 8, '82	"M"	308
------	----	Agreement---	Jan'y 15, '83	----------	Jan'y 22, '83	Vol. 2 of Mis'n Records, page 598.	
160	----	W. D.--------	Mar. 27, '83	1 00	June 9, '83	"N"	403
------	----	Q. D.--------	June 21, '83	75 00	June 30, '83	"N"	432

Abstract of Title to N. E. ¼ of

No.	Grantor.	Grantee.	Subdivision of section.	Sec.	Town.	Range.
12	Eliza S. McDonald, wife of James H. McDonald, of Escanaba, Mich.	Helen Moore, formerly of Negaunee, Mich., now of Ashland, Wis.	Undivided ⅓ of N. E. ¼ of	16	47	46
	The intent of this conveyance being to bar the right of dower of said party of first part in said undivided ⅓ of said parcel of land, which interest has been heretofore conveyed by her husband and me, John McKay, to said party of second part.					
13	John McKay and Jane, his wife, of Ashland, Wis., formerly of Hancock, Michigan.	Helen Moore, wife of Nathaniel D. Moore, of Ashland, Wis.	Undivided ⅓ of N. E. ¼ of	16	47	46
	The intent of this conveyance being to bar the right of dower of said party of first part, Jane McKay, in and to said undivided ⅓ of said parcel of land, which ⅓ has been heretofore conveyed by her husband and one James H. McDonald to said Helen Moore.					
14	Helen Moore, wife of Nathaniel D. Moore, and Nathaniel D. Moore, her husband, both formerly of Negaunee, Mich.	Edward Ascherman, Milwaukee, Wis.	Undivided $\frac{1}{12}$ of N. E. ¼ of	16	47	46
	This conveyance is made and accepted, however, subject to the provisions of a certain agreement for a mining lease, dated Jan'y 15, 1883, executed by and between James H. McDonald, John McKay, and the said Helen Moore, grantor herein, of the one part, and Charles S. Colley, of the other part; which said agreement was recorded in the office of the register of deeds of said county of Ontonagon on the 22d day of January, 1883, in Vol. 2 of Misc'l'n Records, on page 598, reference thereto being had for greater certainty of description thereof. The grantee herein and his heirs and assigns to take an equal $\frac{1}{12}$ interest under and in said contract (& lease, if executed), excepting in the sum of $30,000, neither he or they take or have any part or interest.					
15	Helen Moore, wife of Nathaniel D. Moore, and Nathaniel D. Moore, — husband, both formerly of Negaunee, Mich.	Gordon H. Gile, of Oshkosh, Wisconsin.	Undivided $\frac{1}{24}$ of N. E. ¼	16	47	46
	NOTE.—Same as in conveyance No. 14 above, except that the interest conveyed is $\frac{1}{24}$ instead of $\frac{1}{12}$.					
16	Helen Moore, wife of Nathaniel D. Moore, and Nathaniel D. Moore, — husband, both formerly of Negaunee, Mich.	George M. Wakefield, of Oshkosh, Wisconsin.	Undivided $\frac{1}{24}$ of N. E. ¼	16	47	46
	NOTE.—Same conveyance as No. —.					

Section No. 16, *&c.*—Continued.

Acres.	100th.	Kind of deed.	Date of deed.	Considera-tion.	Date of record.	Liber.	Folio.
------	----	Q. D.------	June 21, '83	$1 00	June 30, '83	"N"	431
------	----	Q. D.------	June 25, '83	$1 00	June 30, '83	"N"	434
------	----	W. D.------	June 16, '83	$10,000 00	June 30, '83	"N"	427
------	----	W. D.------	June 16, '83	$5,000	June 30, '83	"N"	429
------	----	W. D.------	June 16, '83	$5,000 00	June 30, '83	"N"	425

REGISTER'S OFFICE.

STATE OF MICHIGAN, } ss:
County of Ontonagon, }

I, Michael A. Powers, register of deeds in and for the county of Ontonagon and State of Michigan, do hereby certify that the annexed is a true and complete abstract of all the conveyances relative to the land therein described, according to the records and indices in my office.

In testimony whereof I have hereunto set my hand and official seal, at Ontonagon, Michigan, this eleventh day of August, A. D. 1883.

[Register of Deeds, Ontonagon Co., seal.]

MICHAEL A. POWERS,
Register of Deeds.

Exhibit C., A. F. R., N. P.

119 *Further Proofs of Defendants.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Depositions of Wm. D. McIntyre, John McKay, and N. D. Moore, taken Aug. 20th, 1885. Filed Oct. 20th, 1885.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective solicitors, that the testimony of William D. McIntyre, John McKay, and Nathaniel D. Moore, witnesses in behalf of said defendants, may be taken before Ed. F. Gleason, court commissioner in and for Ashland county, in the State of Wisconsin, at his office, in the village of Ashland, in said county, on the 20th day of August, A. D. 1885, at two o'clock in the afternoon, on oral interrogatories to be then and there propounded to said witnesses, and when so taken to constitute a part of the said defendants' proofs in said cause.

Dated August 20, 1885.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

120 In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Depositions of William D. McIntyre, Nathaniel D. Moore, and John McKay, taken on behalf of the defendants in the above-entitled cause, before Ed. F. Gleason, court commissioner in and for Ashland county, Wisconsin, upon oral interrogatories, upon stipulation of the parties, by their respective attorneys, the examination of said witnesses being conducted by I. D. Hanscom on behalf of the defendants and by C. B. Grant on behalf of the complainants.

WILLIAM D. MCINTYRE, on behalf of the defendants, being first duly sworn, deposes as follows:

Q. Where were you living in the spring of 1878?

A. I was living in the Province of Ontario, Canada.

Q. Do you remember of seeing John Monroe and his wife, now Christina Crawford, one of the complainants, at your place in Canada that spring?

A. I do.

121 Q. Where were they living at the time?

A. They were stopping at my father's.

Q. Were you also stopping there?

A. I was.

Q. Did you hear any conversation that spring at your father's, in the presence and hearing of said Christina Crawford, in reference to their (Mrs. Crawford and John Monroe) getting back the note which they had given to Nathaniel D. Moore as a part of the purchase price of the lands in question?

A. Not at that time.

Q. Did you not hear the matter talked over at different times in her presence and hearing?

A. I did, but nothing about the note. She was up on a visit to Hancock, and when she went back she talked about the note.

Q. What time was this she was at Hancock? Was it before or after her husband's death?

A. After her husband's death.

Q. How long after?

A. I can't tell how long after; not very long after.

Q. It is not the question, Mr. McIntyre, whether or not you heard Mrs. Crawford speak about it, but whether or not you heard the matter talked over in her hearing and presence, in your family, in the spring of 1878.

Objected to as incompetent and immaterial.

A. I did hear it mentioned over in the family.

A. No, sir; I could not. I suppose it was because Monroe was was going away.

Q. To whom did you first convey any information in regard to his talk in the family?

A. I cannot tell you.

Q. With whom did you first have a conversation about it since that time?

A. I can't tell you who the first one was.

Q. When did you first tell Mr. Moore about it—about this talk in your father's family?

A. Never, to my recollection. I did not tell Mr. Moore.

Q. When were you in Hancock?

A. About three weeks ago.

Q. How long were you there?

A. I can't tell.

Q. When did you come to Ashland?

A. About three weeks ago; somewhere about that.

Q. With whom have you talked about this since you came here?

A. I spoke to Mr. McKay a little about it, probably.

Q. When did you speak to him about it?

A. Since I came to Ashland.

125 Q. You were at your sister's, in Hancock, when you were were there last—Mrs. Crawford's?

A. Yes.

Q. There some two or three weeks?

A. Yes; I was there two weeks.

Q. Staid at her house all the time?

A. Yes.

Q. Your testimony was taken while there, in this case?

A. Yes, sir.

Q. Did you say anything to her about this conversation at your father's?

A. I don't know as I did; it was no use of talking — what she knew.

Q. Did you have a conversation with me at Houghton, in my office, in the presence of Daniel Crawford, when you were there, some two or three weeks ago, in regard to this suit?

Objected to as improper cross-examination, as incompetent and irrelevant.

A. Yes, sir.

Q. Was Mrs. Crawford present in that conversation?

Objected to for same reason as above.

A. You questioned me twice. She was there once, and once she wasn't.

Q. Did I not ask you in that conversation if you ever heard John Monroe say anything about his transaction with Mr. Moore in regard to this land?

A. I don't recollect whether you did or not.

Q. Did not you in reply to such a question say that you did not?

Objected to for same reasons as above.

A. I don't recollect.

Q. Did I not ask you then if you knew anything about it, and if you ever heard Moore or Mr. Monroe say anything about it?

Same objection as above.

A. I don't recollect of your asking me the question.

Q. Did you not say in reply, "No," and that you never heard either of them say anything about it?

Same objection as before.

126 A. Not that I recollect.

Q. Where have you been staying since you came here to Ashland?

A. At Mr. McKay's.

Q. That Mr. McKay is the one whose testimony has been taken in this case?

A. I rather think his testimony has been taken.

Q. In that conversation at my office with me, was not this note talked about?

Same objection as before.

A. I don't recollect.

Q. Did I not state to you or to Mr. Crawford in your presence then that Mr. Moore claimed that a note was given by Monroe to Moore for a part of the consideration of the purchase of this land, and that Moore claimed that he had given the note up to Monroe and had made a settlement with him?

Objected to for same reason as before.

A. I don't recollect; I heard so much about the note that I can't tell what was said.

Q. Did I not at that time read over in your hearing a portion or all of Mr. Moore's testimony?

Same objection as before.

A. I don't know but you did, but I can't remember anything that was in it.

Q. Did I not also read over the testimony of Mr. and Mrs. McKay?

Same objection as above.

A. I can't remember whether you did or not.

Q. At that time you said nothing either to me or to Mr. and Mrs. Crawford about this family talk?

Same objection.

A. No; and I wouldn't say anything about it to-day if I was let alone.

127 Redirect examination:

Q. About how long after your testimony was taken at Houghton before it was read over to you and signed by you?

A. I couldn't be certain.

Q. About how many days?

A. About three or four days.

Q. Who were present at the time it was read over to you and signed by you?

A. Crawford was there, I think, and three or four other gentlemen; can't recollect their names.

Q. Was Mr. Ball present, the one who was present at the time your testimony was taken?

A. I think not.

It is admitted that Mr. Crawford, C. B. Grant, and the commissioner and the witness were present when the witness' testimony was read over to him and signed by him.

WILLIAM D. McINTYRE.

NATHANIEL D. MOORE, on the part of the defendants, being first duly sworn, deposes and says:

Q. At the time referred to in your former examination, when you say John Monroe gave a note to you of $240 as part payment for a piece of land, the land in question, who were present at the time?

A. As near as I can remember, there was no one but Mr. Hansen, a justice of the peace, Mr. Monroe, and myself; whether there was any one else I cannot say.

Q. Where was the transaction had—the giving of the note and executing the deed?

128 Objected to for the reason that the witness has been previously examined fully on this subject.

A. At Mr. Hansen's office.

Q. Were you on that day or occasion at Mr. Monroe's house in Ishpeming?

Same objection.

A. Yes, sir. I slept there the night before; had breakfast there, and came down with him to the justice's office.

Q. Did Mrs. Monroe, now Mrs. Crawford, at that time know of the fact of her husband giving you that note?

Same objection, and further that it is incompetent and immaterial.

A. Yes, sir. The matter was all talked over before her and arranged. The $10 was paid over before her; she was not present when the note was given, but she understood the whole matter just as well as Mr. Monroe and myself. I think so; I am quite certain the $10 was paid me at her house.

Q. The note which has been introduced in evidence in this case, I think, bears date the first day of November, while the deed is dated about the 18th of October. On your former examination you stated that they were both made out at the same time. Is that still your recollection, that they were both made out on the same occasion?

Objected to as incompetent and inadmissible, being a matter which was equally within the knowledge of the deceased, John Monroe, and therefore the witness is excluded from testifying in regard to it.

A. Yes, sir. It was given at the same time, and it was dated ahead to accommodate Mr. Monroe, who had some paper due a year from the 1st day of November; I think from Wetmore; that is my recollection of whom the paper was on that he held; that
129 was Wetmore, who was agent of the New York mine at the time; that is my impression; I would not swear.

Q. In this talk and transaction which you say took place in Mrs. Monroe's presence and before her—was it before or after the note was given, or both?

A. Before.

Q. When you say that it took place before her what do you mean—as to where she was at the time as regards you and Mr. Monroe?

A. She was present in the same room, and was a party to the whole thing and took part in the conversation.

NAT. D. MOORE.

JOHN MCKAY, in behalf of the defendants, being first duly sworn, deposes and says:

Q. Do you remember the occasion of Mr. Crawford coming to your house in Hancock some time in January and having a conversation with regard to this matter in controversy?

A. Yes, sir.

Q. Mr. Crawford has testified in this case that on that occasion he asked you if a deed from you and McDonald to Nathaniel D. Moore had ever been delivered to Mr. Moore, and that you said you didn't know. Is that true, or did you ever make such a statement to him?

A. I did not.

Q. In that conversation did you tell him anything different from what you have heretofore testified to in this case?

A. No, sir.

Q. He further testifies that he received a letter from you in which you stated that Mrs. Crawford had been over and abused you to your wife and that you wouldn't come (to their attorney's office), and that you would do the most you could to hurt them in the suit.
130 Did you ever write any letter containing such a statement in substance or effect?

A. I don't remember of ever writing a letter to Crawford in my life.

Q. Can you state positively whether or not you ever wrote a letter

containing such a statement that you would do the most you could to hurt them in the suit?

A. I don't think I ever did.

JOHN McKAY.

STATE OF WISCONSIN, } ss:
Ashland County, }

I, Ed. F. Gleason, court commissioner in and for said Ashland county, do hereby certify that the above and foregoing depositions were taken before me, at my office in the town of Ashland, in said county, on the 21st day of August, A. D. 1885, at 3 o'clock in the afternoon; that they were taken on behalf of the defendants upon stipulation between the parties, by their respective attorneys, upon verbal interrogatories; that they were reduced to writing by myself; that they were taken to be used in the action of Christina Crawford, Mary Ann Monroe, and John D. Monroe, infants, by their next friend, Claudius B. Grant, complainants, *v.* Nathaniel D. Moore and Helen Moore, defendants, now pending in the circuit court of United States for western district of Michigan, northern division, in equity; that I. D. Hanscom attended at the taking of said depositions on behalf of the defendants and C. B. Grant on behalf of the complainants; that said deponents, and each of them, before examination was sworn to testify the truth, the whole truth, and nothing but the truth relative to said cause, and that said depositions were
131 carefully read to said deponents and each of them and then subscribed by them and each of them in my presence.

ED. F. GLEASON,
Court Commissioner, Ashland County, Wis.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective solicitors, that the deposition of William McKay, of Minto, Dakota, may be taken by and before Edward E. Daily, Esq., or George Brown, Esq., of said Minto, in the Territory of Dakota, on behalf of the said defendants, upon the interrogatories and cross-interrogatories hereto annexed, and that said depositions, when so taken, may be returned by mail to the clerk of said court at Marquette, Michigan, and may be used and introduced in evidence on the trial of said cause, subject to objection only for incompetency and immateriality, all matters of form
132 in the taking, certifying, and returning of said deposition

being hereby expressly waived, and answers that are not strictly responsive shall not be competent under this stipulation.

BALL & HANSCOM,
Solicitors for Defendants.
CHANDLER & GRANT,
Solicitors for Complainants.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Interrogatories to be propounded to William McKay, of Minto, Dakota, a witness to be produced, sworn, and examined on behalf of said defendants, before Edward E. Daily, Esq., or George W. Brown, Esq., of said Minto, Dakota, by virtue of the stipulation hereto annexed.

First Interrogatory. State your name, age, place of residence, and occupation.

Second Interrogatory. Are you acquainted with Nathaniel D. Moore, one of the defendants in this suit? If so, how long have you known him?

133 Third Interrogatory. Do you know John McKay and his wife, Jane McKay, now of Ashland, in the State of Wisconsin? If so, how long have you known them and each of them?

Fourth Interrogatory. Do you remember the occasion of your having a note of $240 made by one John Monroe, then the husband of the complainant, Christina Crawford, and payable to Nathaniel D. Moore, one of the defendants in this suit, some time in the spring or summer of 1876? If so, state fully how the note came in your possession, for what purpose it came in your possession, and what you finally did with said note.

Fifth Interrogatory. If, in answer to the foregoing interrogatory, you have said that you had such a note, and that you finally left the same with the said John McKay or his wife, state what directions, if any, you gave them or either of them in regard to the note.

Sixth Interrogatory. State, as near as you can, the time of the year when you obtained possession of said note and when you left it at McKay's.

Seventh Interrogatory. If you shall have already answered that you obtained said note from defendant, Nathaniel D. Moore, for the purpose of endeavoring to raise money thereon for said Moore, state whether or not you were able to raise or obtain any money on said note, and, if not, for what reason.

Eighth Interrogatory. Who was the owner of said note while the same was in your possession and at the time that you left it at McKay's, and were you ever the owner of said note?

134 *Deposition of William McKay.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

TERRITORY OF DAKOTA, } *ss:*
County of Walsh, }

WILLIAM MCKAY, of Minto, Dakota, being duly sworn according to the law, doth depose and say that the answers he will give to the interrogatories and cross-interrogatories in said deposition will be true.

Answer to first interrogatory. William McKay; thirty years old; residing in the township of Forest River, Walsh county, Dakota Territory; occupation, a farmer.

Answer to second interrogatory. Yes; have known him since February, 1873.

Answer to third interrogatory. Yes; have known John McKay since I was old enough to remember—at least over twenty-five years—and Jane McKay since July, 1872.

Answer to fourth interrogatory. Yes; it came into my possession by Nathaniel D. Moore giving — to me for the purpose of raising money on it from either Daniel or Archibald McIntyre—John
135 Monroe's brother-in-laws—for Moore. I finally left the note with John McKay or his wife.

Answer to fifth interrogatory. I did not give any directions.

Answer to sixth interrogatory. Obtained possession of the note about the month of September, 1876; left at McKay's in a short time afterward—about the last of September, 1876.

Answer to seventh interrogatory. Was not able to raise any money on the note for the reason that Mrs. McKay told me the McIntyres would not pay any money on the note because Monroe would not pay the note.

Answer to eighth interrogatory. Nathaniel D. Moore. I never owned the note.

WILLIAM MCKAY.

Subscribed and sworn to before me this thirty-first day of October, 1885.

[SEAL.] EDWARD E. DAILY,
Notary Public.

Certificate to Deposition.

TERRITORY OF DAKOTA, } ss:
County of Walsh, }

I, Edward E. Daily, a notary public in and for the county of Walsh and Territory of Dakota, do hereby certify that William McKay, the witness in the deposition hereunto attached, was first duly sworn to testify to the truth, the whole truth, and nothing but the truth.

136 That the said deposition was taken before me and by me, the said Edward E. Daily, and that said deposition was written and subscribed in my presence by virtue of and pursuant to a stipulation hereunto annexed.

Witness my hand and notarial seal this 31st day of October, 1885.

[SEAL.] EDWARD E. DAILY,
Notary Public.

137 *Further Proofs of Complainants.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Depositions of James McIntyre and James Beattie, taken September 19th, 1885. Filed September 30th, 1885.

It is hereby stipulated in the above-entitled cause that the depositions of James McIntyre and Margaret Beattie, of Alvinston, Ontario, may be taken before Richard Code, of said place, a commissioner for taking affidavits in the high court of justice for the county of Lambton, in the Province of Ontario, and duly authorized to administer oaths, on the 19th day of September, A. D. 1885, and that said depositions, when so taken, may be read in evidence upon the hearing of said cause, subject only to such objections as shall be made at the time of taking the same.

Said witnesses are to be produced and sworn on behalf of the complainants upon oral interrogatories.

Dated September 19th, 1885.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

138 In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

The depositions of James McIntyre and Margaret Beattie, taken before me, Richard Code, a commissioner for taking affidavits in the high court of justice for the county of Lambton, in the Province of Ontario, this nineteenth day of September, A. D. 1885, pursuant to the stipulation which is hereto attached, Claudius B. Grant appearing as solicitor for the complainants and Dan. H. Ball, as solicitor for the defendants.

JAMES MCINTYRE, a witness produced on behalf of the complainants, having been by me first duly sworn that the testimony he will give in said cause shall be the truth, the whole truth, and nothing but the truth, testified as follows:

Q. What is your age, name, and residence?

A. My name is James McIntyre; age, 64 years; and residence, Alvinston, Ont.

Q. How long have you lived here?

A. About two years, and in this township over forty years.

Q. Are you the father of Mrs. Crawford, one of the complainants?

A. Yes.

139 Q. Did you know John Monroe?

A. Yes.

Q. How long did you know him before his death?

A. From his infancy. He was about thirty-four years old when he died.

Q. When and where did he die?

A. In Denver city, Colorado, in August, 1878.

Q. Was he here the summer he went to Colorado?

A. Yes.

Q. About what time did he go?

A. The first day of July.

Q. How long was he here at that time?

A. As near as I can come at it, about a month.

Q. Where did he stay when here?

A. He staid at Mrs. Beattie's a good share of the time and up at our place on the farm, about three miles from here.

Q. At which place did he stay the most?

A. I think he stayed most at Beattie's.

Q. Mrs. Beattie is your daughter?

A. Yes.

Q. How far did she live from you?

A. About four miles.

Q. Was he sick that summer?
A. Yes.
Q. Did you hear Mr. Monroe during that time say anything about some land which had been deeded to him by Nathaniel D. Moore?
A. No.
Q. When did you first learn that such deed was made to him or that he ever owned such land?
A. After his death.
Q. While Monroe was here during that summer did you ever hear him say anything about the purchase of land from Moore or what he paid for it?
A. No, sir.
Q. Did he ever say anything to you about such purchase or the consideration for it?
A. No, sir.
Q. Did you ever hear any talk in the family at that time about it?
A. No, sir; I did not.
Q. Did Monroe ever talk with you or in your presence about such purchase?
A. No, sir.
140 Q. Did you formerly live in Calumet, Houghton county, Michigan?
A. Yes, sir.
Q. When and how long?
A. I was there for some four years and four months; I think it was nine years ago since I left there.
Q. Did Mrs. Crawford, then Mrs. Monroe, visit at your house there?
A. Yes, sir.
Q. Could you fix the year?
A. I could not really fix the year.
Q. How many times did Mrs. Crawford, then Mrs. Monroe, visit you there alone?
A. Only once that I remember of.
Q. What time of year was that?
A. I think, as near as I can come at it, about the 4th day of July.
Q. Do you remember of her being there on the 4th of July?
A. Yes, sir.
Q. Was she ever there more than one fourth of July?
A. No, sir.

Cross-examination by Mr. BALL:

Q. At the time Mrs. Monroe was at your place at Calumet did she speak of having received a note of John Monroe's?

Objected to by Mr. Grant as immaterial and incompetent.

A. I heard her talking about receiving a note; she did not say what note it was.

Q. Did she say that it was a note that her husband had made to Mr. Moore?

Same objection.

A. I don't remember of her saying that.

Q. Don't you remember of making an affidavit before Mr. Code last month?

A. I do.

Q. Don't you remember saying then as follows: I remem-
141 ber of her saying that she had received the note from Mrs. Jane McKay that her husband made to Nathaniel D. Moore?

Same objection.

A. No, sir; I did not know whether he made it to Nathaniel D. Moore or not.

Q. Did not you state that you heard Mrs. Monroe say that it was a note that her husband had made to Nathaniel D. Moore?

Same objection.

A. Well, I don't remember if I did. I heard that she got a note, but what it was for I could not say.

Q. Did you understand then that it was a note that Mr. Monroe had made?

Same objection.

A. I did not understand who made the note.

Q. This paper which I hold here was read over to you by Mr. Code?

A. Yes; if I understand it right, that is my mark. (The paper shown the witness is hereto annexed, marked Exhibit "A.")

Said paper objected to as incompetent and immaterial.

Q. Did you hear Mr. Monroe, while he was staying here, say anything about having bought any land in Michigan?

A. No, sir.

Q. Did you hear him say as to whether he owned any land in Michigan?

A. No, sir; I did not; only a silver mine on the other side of Ontonagon that he said he had some interest in.

Q. Did you hear him say anything about any iron land?

A. No.

Q. Did you ever hear him say anything about a note he had given to Moore?

A. No, sir.

Q. Did you ever hear him say anything about having got a note back from Mr. Moore?

A. No, sir; I did not.

Q. Do you recollect, shortly before Mr. Monroe went to Col-
142 orado, going out to the woods with him, sitting down on a log, and he talking over his affairs with you?

A. Well, sir, we were in the woods, not on a log, but on the grass, and talked over his matters.

Q. Did he tell you then what things he had for his family to depend upon in case he should not live long?

A. Well, yes, he told me some things. He spoke about his insurance and no other property. I don't know but he said something about that silver mine. He seemed downhearted and thought he would not live long.

Q. Did he say whether he had anything else?

A. No; not to me then.

Q. Did not he say to you that the insurance was all he had?

A. No.

Q. Don't you remember his telling you at that time that he had got his note back from Moore and had nothing to hope for or expect from that land?

A. He never said a word about the land to me or the note.

Q. Then the only property that he spoke of was the life insurance and the interest in the silver mine?

A. Yes, sir.

Q. How long was that conversation before he went to Colorado?

A. Well, I could not tell you. It was during the time he was here.

Q. How did he come to have this conversation with you?

A. I forget now. He was talking about his insurance.

Q. Was he talking over with you what he had to leave for his family in case of his death?

A. No; he was only talking about his insurance, and he was afraid he would be sick a long time.

Q. Did you tell your son, William D. McIntyre, about that conversation?

A. I don't remember.

Q. Then you don't remember having any talk with your son, William, about that conversation with Mr. Monroe?

A. No, sir.

143 Redirect examination:

Q. Was Mr. Moore here on August 25th, when you made that affidavit?

A. Yes, sir.

Q. Did he go to your house?

A. Yes, sir; after I made the affidavit, not before.

Q. Did he send for you?

A. I suppose so; Mr. Code met me on the road up here and said a gentleman wanted to see me.

Q. Where did you first see him?

A. I saw him coming up the stairs here in this office.

Q. Where does he live?

A. I suppose in Ashland, Wisconsin, where I used to see him.

Q. Are you sure that in that conversation with Monroe that he spoke of anything except his life insurance?

A. Not that I remember.

Q. He spoke of the payments on his life insurance, and feared that he could not keep them up if he continued to be sick?
A. Yes, sir; he spoke of that.
Q. What did you tell him?
A. I told him that would be all right, I would see them paid.
Q. Did he at that time express any fears about his family or their support?
A. No.
Q. How long was Mrs. Monroe in Calumet at the time of her visit when she was there July 4th?
A. I could not tell how long, only a few days.

Recross-examination:

Q. How long did that conversation last between you and Mr. Monroe on the grass?
A. I don't know how long; we just sat down for him to draw his breath for a rest.

144 Redirect:

Q. How happened you and he to be out together?
A. He told me he would like to walk out in the bush.
Q. I see you make your mark; why is this?
A. Because my hand trembles so.
Q. You can read and write, can you?
A. Yes, sir.

his
JAMES x McINTYRE.
mark.

Sworn before me at Alvinston, in the county of Lambton, this nineteenth day of September, A. D. 1885.

RICHARD CODE,
A Commissioner, etc., in H. C. J.

EXHIBIT "A."

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

In the Matter of CHRISTINA CRAWFORD, JOHN D. MONROE, and MARY Ann Monroe, Infants, by C. B. Grant, Their Next Friend, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

I, James McIntyre, of the village of Alvinston, in the county of Lambton and Province of Ontario, yeoman, do solemnly swear and say—

1. That in the year 1876, when my daughter, Christina
145 Monroe, came to visit me at Calumet, in the State of Michigan, I remember of her saying that she had received the

note from Mrs. Jane McKay that her husband made to Nathaniel D. Moore.

2. Afterward, in the year 1878, previous to my son-in-law, John Monroe, going to Denver, Colorado, where he died, he and my daughter were living with me, and John Monroe was talking to me and said that he had his life insured, and said if he had such poor health for a year or two he would not be able to meet his payments with the company, and I told him not to trouble about that, and I do not remember of him telling me that he owned any of the land in question.

his
JAMES x McINTYRE.
mark.

Sworn before me at Alvinston, in the county of Lambton, this 25th day of August, 1885.

RICHARD CODE,
A Com'r for Taking Affidavits, etc., in H. C. J.

MARGARET BEATTIE, a witness produced on behalf of the complainants, having been by me first duly sworn that the testimony she will give in said cause shall be the truth, the whole truth, and nothing but the truth, testified as follows:

Q. Your name, age, and residence.

A. Margaret Beattie; age, 41 years; residence in the township of Brooke. I am the sister of the complainant, Mrs. Crawford. I have lived here nearly all my life. I knew John Monroe in his lifetime. I was here the summer he went to Colorado and died.

146 I was here all the time that he was here. He left to go to Colorado the first of July. He had been here about a month I should judge. He was sick during that time. He went to Colorado for his health.

Q. Where did he spend his time when here?

A. He spent the most of his time at our place, Mr. Beattie's, and the rest of the time at my father's.

Q. Where was he when he packed up to go away?

A. At our place.

Q. Who were there?

A. His wife and myself. I helped her pack his trunk.

Q. Did he and his wife have any papers there at that time?

A. Yes, sir.

Q. Did you see any of them?

A. Yes, sir.

Q. In general, what were they?

A. Notes, deeds, and accounts that he left behind him.

Q. Did he say anything to his wife at that time about any of his papers?

A. Yes, sir.

Q. What did he say?

Objected to by defendants' counsel as incompetent and hearsay

A. He was looking over those papers and dividing them. The deed of the silver property—he said to her, calling her by name, "I will take this deed. I may meet with speculators on the way and be able to sell it."

Q. Did you at that time see a deed from Nathaniel D. Moore to John Monroe?

A. Yes, sir; I did.

Q. Do you know where the lands described in it were situated?

Objected to by defendants' counsel as incompetent.

A. Well, I understood that it was near about the boundary of Wisconsin and Michigan.

Q. Did he say anything to his wife about that deed?

A. Yes, sir.

147 Q. What was it?

Objected to as incompetent and hearsay.

A. He said to her to keep this deed and take good care of it. It would come good to her and the children some day.

Q. How long was this before he went away?

A. Well, I am not sure whether it was the day or two days before he went away.

Q. Were you at your father's often during the time Monroe was here then?

A. I don't think I was; I don't know as I was there at all.

Q. Did you see a letter written by John McKay to your brother, William D. McIntyre?

A. Yes, sir; I saw different ones.

Q. Did you see one in which he referred to letters written by him to your brother in regard to this land now in dispute?

A. Yes, sir.

Q. When was it?

A. I could not tell you the date.

Q. Was it before or after this controversy arose?

A. After.

Q. Did you read the letter or hear it read?

A. I heard it read by my brother.

Q. Do you remember any of its contents?

A. Yes, sir.

Q. Did he say anything in it about letters which he had written to your brother in regard to the land in controversy?

Objected to as incompetent because the letter is the best evidence; and, further, that it is hearsay; also irrelevant.

A. Yes, sir.

Q. What was it?

Objected to by defendants' counsel as irrelevant and incompetent.

A. He said to burn those letters or send them back to him.

Q. Do you know what your brother did with them?

A. Not of my own knowledge.

148 Cross-examined by Mr. BALL:

Q. When looking over those papers of Mr. Monroe's before he went away how many deeds did you see?

A. Two.

Q. How many notes?

A. I could not tell; there was a good many papers; I could not tell what they were.

Q. Did you read either of the deeds?

A. No, sir.

Q. Did you look into them and read anything that was in them?

A. I looked while other parties were reading them; I did not read anything in them.

Q. Your impression of where the land was situated was obtained from what you heard said?

A. Yes, sir.

Q. Did he say anything to his wife about any particular note?

A. No, sir.

Q. While Mr. Monroe was at your house, before going to Colorado, who were the members of your family?

A. Mr. Monroe and Mrs. Monroe, Mr. Beattie and myself.

Q. Who, during that time, constituted the members of your father's family?

A. Three—namely, my father, mother, and two brothers, William D. and Archibald.

Q. Are they all at home now?

A. No, sir.

Q. Where are they?

A. I have one brother, Archibald, living two or three miles from this place, and W. D. is at Ashland, Wisconsin; my father and mother are living in this village.

Q. Was your brother W. D. frequently at your house at that time—during the time Mr. and Mrs. Monroe were there?

A. Yes, sir.

Q. About how often?

A. I could not tell you; he was quite often.

149 Redirect examination:

Q. While Monroe was at your house at that time was there any conversation by Monroe or any one in his presence in regard to a note given by him to Moore?

A. No, sir; not in my hearing.

Q. Was there any conversation in your hearing during that time by any member of the family or Monroe about the purchase of this land?

A. No; except what he said before he went away about the deed which I have already told.

Recross-examination:

Q. Did you ever hear Mr. Monroe speak of that land while he was staying at your house?

A. No, sir; except the time I spoke of.

Q. Did you ever hear the land mentioned during that time?

A. No, sir; I don't think I did.

Q. Did you know then that your brother William had an interest in it?

A. Yes, sir.

Q. Didn't you ever hear of a note that had been given by Mr. Monroe to Mr. Moore before Mr. Monroe went to Colorado?

A. No, sir; I never knew anything about it.

Q. Did you ever hear any talk by or with Mr. Monroe while he was staying at your house about what property or lands that he had aside from the occasion you have mentioned?

A. No, sir.

her
MARGARET x BEATTIE.
mark.

Sworn before me, at Alvinston, in the county of Lambton, this nineteenth day of September, A. D. 1885.

RICHARD CODE,
A Commissioner, etc., in H. C. J.

150 COUNTY OF LAMBTON, *Province of Ontario,* } *To wit:*

I hereby certify that the above-named witnesses appeared before me, at my office, in the village of Alvinston, Province of Ontario, on the nineteenth day of September, A. D. 1885; that Claudius B. Grant appeared on behalf of the complainants and Dan. H. Ball on behalf of the defendants; that said depositions were by me reduced to writing, and, after being so reduced to writing, were by me read over to each of said witnesses, and that said depositions were then signed by said witnesses in my presence, and that they each made oath that the foregoing deposition by him and by her subscribed contains the whole truth and nothing but the truth. I further certify that my fees were five dollars, and were paid me by the complainants.

Witness my hand this nineteenth day of September, A. D. 1885.

RICHARD CODE,
A Commissioner for Taking Affidavits in the High Court of Justice.

151 *Stipulation.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

It is hereby stipulated and admitted by and between the parties to the above-entitled cause, by their respective solicitors, that the

depositions heretofore taken and filed in said cause, to wit, the deposition of James H. McDonald, taken on the 4th day of January, 1883, and filed July 31st, 1885; depositions of John McKay and Jane McKay, taken January 8th, 1885, and filed July 14th, 1885; depositions of James H. McDonald and Nathaniel D. Moore, taken January 29th, 1885, and filed January 4, 1886; depositions of William D. McIntyre, Christina Crawford, and Daniel Crawford, taken July 23d, 1885, and filed July 29th, 1885; depositions of James McIntyre and Margaret Beattie, taken September 19th, 1885, and filed September 30th, 1885; depositions of John McKay, William D. McIntyre, and Nathaniel D. Moore, taken August 21st, 1885, and filed October 20th, 1885; depositions of William McKay, taken October 31st, 1885, and filed November 16th, 1885, were each and all regularly taken by consent, and that each of said witnesses was duly sworn before being examined and that each deposition was duly read over to the witnesses, respectively, before signing.

152 It is further stipulated and agreed as aforesaid that all said depositions may be read in evidence at the hearing, subject only to the objections appearing upon or noted in said depositions, hereby expressly waiving the want of jurat or signature of commissioner, as well as any informality or insufficiency which may exist in any jurat or certificate to any of said depositions.

It is further stipulated and admitted that the value of the property in dispute exceeds the sum of $5,000.

Dated this 4th day of January, 1886.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

153 Further cross-examination of N. D. Moore, a witness for defendants, taken February 13th, 1886. Filed February 15th, 1886.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Additional cross-examination of Nathaniel D. Moore, taken before me this 13th day of February, 1886, in pursuance of a stipulation between the respective parties.

Examined by T. L. CHADBOURNE, counsel for complainants:

Q. When you made the deed to John Monroe, mentioned in the bill, you were single, unmarried?

A. Yes, sir.

Q. Do you know or have you ever seen Mrs. Crawford's children by her first husband?

A. I suppose I saw them when I was at the house at the time of giving the deed.

Q. How old or about how old were they?

A. I can't tell anything about their age.

154 Defendants' counsel admits that the ages of the infant complainants are correctly stated in the petition for the appointment of next friend.

Q. Is the one-sixth interest in controversy worth more than $5,000? And, if so, in a general way state its value.

A. Yes, sir; it is worth more than $5,000; it is probably worth $25,000 or $30,000.

Q. When was the note which you say you gave to Monroe of $160 payable?

A. Well, I can't remember. I think very likely it was either six months or a year; can't tell exactly.

Q. You say in your testimony that you told your wife why the deed was to be made to her; what did you tell her about it?

A. I told her that Mr. McDonald and Mr. McKay proposed to deed the one-sixth interest to her.

Q. The question has been previously asked you why did you not have those deeds made to you (the deeds meant are the deeds from McDonald and McKay and their wives). You answered, "Well, the reason was on account of this deed being out that I gave to Monroe. I found that that deed had been recorded, and John Monroe was then dead, and I expected that Mrs. Monroe would make trouble. That is exactly the reason." Then you were asked, "Did you tell your wife about this?" and you answered, "Yes, sir; I believe I did." Now, I ask you what you told her?

Objected to as irrelevant.

A. Well, I think that, viz., what has been above read over to me, is substantially what I told her; McDonald and McKay proposed to make the deed to her.

Q. This you told her, of course, before the deed was made to her?

A. Yes, sir.

Q. Your wife conveyed, I believe, a one-sixth interest or one-half the interest conveyed to her in this land to somebody; when and to whom was this conveyance made?

155 Objected to as incompetent and irrelevant.

A. The deed was made to George M. Wakefield, Edward Ascherman, and perhaps somebody else. I think it was made two years ago last June.

Q. What did they pay for it?

Objected to as irrelevant.

A. Twenty thousand dollars.

Q. Was the deed made by you on a power of attorney from your wife or otherwise?

Objected to as irrelevant and incompetent, and all these questions relating to the conveyances by Mrs. Moore also objected to as not admissible on the cross-examination under the stipulation.

A. No, sir; I think not; I think she came to Milwaukee and executed the deed herself; I am satisfied that she signed the deed herself.

Q. Did your wife not give you a full power of attorney to make sale of these lands and conveyances thereof on such terms as seemed to you best, and also full power to collect the rents—the royalties?

Objected to as incompetent and irrelevant and not proper cross-examination.

A. There is a power of attorney now in the bank; I don't know but that was the intention, to give me power to collect the rents for her; to make a lease given to the Penokee & Gogebic Development Company. I don't know whether it gives the right to sell the property or not.

Q. When was this power of attorney made?

Same objection as before.

A. There are two powers of attorney—one power of attorney to make the lease and one to collect the royalties.

Q. Did your wife not give you a power of attorney relating to this interest in land in suit, and before that time—before the power to lease was given?

156 Objected to for same reasons as above.

A. No, sir; she did not; the lease was made before the sale.

Q. When was the lease made?

A. I think the lease must have been made about three years now.

Q. Has any royalties been paid by the development company?

Objected to as irrelevant.

A. Yes, sir; one; I think it is $1,298.

Q. Is that the only one?

A. Yes, sir; the only one.

Q. Was that paid to you?

Objected to as irrelevant.

A. I collected the money—yes; I signed her name under power of attorney that the bank held; I collected as her attorney.

Q. Who collected the $20,000 for the sale of the one-sixth interest?

Objected to as irrelevant.

A. I guess very likely I took the money; I guess the money was handed to me.

Q. Well, was it not so in fact?

A. Well, I could not make sure whether it was handed to her and she handed it to me; I am not sure; I couldn't tell.

Q. Who negotiated the lease to the development company and attended to the business relating thereto?

Objected to as irrelevant.

A. I did as her attorney.

Q. Previous to the lease to the development company there was an arrangement with some other concern, was there not, looking to the lease of the property?

A. Yes, sir; the Cambria Iron and Steel Company.

Q. When was that arrangement pending?

A. I wouldn't be sure whether it was in 1880 or 1881.

Q. Who attended to that?

157 Same objection.

A. Well, I wouldn't be sure how that option was signed, whether it was signed by more than McDonald and McKay. I don't know whether it was given before my wife got her deed or not. If given after she got her deed, it was shortly after.

Q. Irrespective of who signed the option, who carried on negotiation with the Cambria Company respecting the option or lease—I mean relative to this interest?

Same objection as before.

A. They had an extension on the option once or twice. I can't tell whether McDonald or McDonald and McKay signed it. I could not sign it for my wife, as I had no power of attorney at that time.

Q. Irrespective of who signed the option, who conducted the negotiations respecting the one-third interest originally promised you which led up to the option to the Cambria Company?

Same objection as before.

A. We left the whole thing with Mr. McDonald; he did all the corresponding relating to the matter.

Q. Who corresponded and talked with McDonald upon the matter in behalf of this third interest?

A. I presume I did.

Q. At this time you say, do you, that you had no power of attorney from your wife?

A. I don't remember of having any.

Q. Now, do you recollect whether the land had been deeded to your wife before the arrangement to the Cambria Company was made?

A. I do not.

Q. What has become of the money above mentioned—of $20,000 and the royalty?

Objected to as irrelevant.

A. It is into mining stock, mining properties; Ashland property.

Q. In whose names are the mining stocks?

158 Objected to as irrelevant and incompetent.

A. Mining stocks are in my name; my wife bought some property in Milwaukee.

Q. In whose name is the property in Ashland?

Same objection.

A. My name.

Q. In whose name is the mining property you have mentioned?

Same objection.

A. My name.

Q. Do you keep any books of account?

Objected to as irrelevant.

A. Yes.

Q. Do you keep any account with your wife on them?

Objected to as incompetent and irrelevant.

A. No, I can't say I do. My wife has the same right to the bank that I have; she signs checks as I do.

Q. Who invested in the mining stock and mining property you have mentioned?

Objected to as irrelevant.

A. I did sometimes at her suggestion.

Q. Have you not dealt as freely with the interest in question in this suit since the deed was made to your wife as before?

Objected to as irrelevant.

A. I have done the very best that I could do in investing the money derived from the property for the benefit of her and her children.

Q. Have you not acted with respect to the interest in question as freely as if it stood in your own name with her consent and knowledge?

A. I think I have been more careful with the money that I got from that, on account of it belonging to her, than though it had belonged to myself.

Q. Was it not understood between you and your wife that
159 the title to this property in question in this suit being put in her name should make no difference as to the beneficial ownership thereof?

Objected to as incompetent and irrelevant.

A. I never have said a word or never had any understanding with my wife but what the interest absolutely belonged to her.

Q. Was it not understood between you and her that the interest should remain in your control and subject to your disposition?

A. No, sir.

Q. Has it not been, in fact, under your control and subject to your disposition?

A. I have managed it to the best of my ability, because she asked me to do it. I have never done anything without fully consulting her about it.

Q. Has it not been, in fact, under your control and subject to your disposition?

A. Now, I don't know just how to answer that. Whenever there was a proposition made to me, either for a lease or a sale, I laid it before her; if she was satisfied with the proposition she gave me the power of attorney to act for her.

Q. Was it not understood between you and your wife, before the deed was made to her, that you should have the control of the property as fully as if the deed were made to you?

A. No, sir; it was not.

Q. Was it not expected before the deed was made to her that the property would be leased to the Cambria Company, above mentioned?

Objected to as irrelevant and incompetent.

A. I can't say whether we expected to give them an option or not.

Q. Was the matter of giving the Cambria an option talked of?

A. That I can't answer, either.

Q. You said, in your former examination, that Monroe gave you $150 to enter a certain piece of land that was not entered; was not that $160 instead of $150?

A. No, sir; it was $150.

160 Q. Was that a forty out of a school section?

A. It was.

Redirect examination by Mr. BALL:

Q. You may explain how it happened that Monroe gave you only $150 instead of $160.

A. The reason was that Mr. Monroe had to pay either ten or fifteen dollars to discount a note to get the money. I told him that I would throw off the ten dollars on that account.

Objected to as incompetent under the statute.

Q. About that $150 note you gave to Monroe, what was the understanding as to when you were to pay it?

Objected to as not coming within the terms of the stipulation under which this testimony is taken, not being strictly re-examination, and also as relating to matters equally within the knowledge of the deceased under the statute.

A. He agreed to take it in installments, as I could pay it.

Q. Are you sure the note was not payable on demand?

Objected to as incompetent under the statute and against the terms of the stipulation and leading.

A. Well, I can't answer that; I wouldn't be sure.

Q. You have heard this notice read which is to be attached to

your deposition, requiring the production of a written contract, have you not?

A. Yes, sir.

Q. Have you any such written contract with you?

A. No, sir.

Q. Where is your place of business, where your books and papers are kept?

161 A. Some of my books and papers are kept in Milwaukee and the balance in Hurley, Wisconsin.

—. When did you leave Milwaukee to come here to give this deposition?

A. One-twenty yesterday morning.

Q. Have you any such contract, or have you ever had one?

A. I have no such contract, and I never had one.

Recross-examination by Mr. CHADBOURNE:

Q. Was the understanding between you and Monroe that the note you gave might be paid in installments made before or after the note was given?

A. I think it was made before. We talked the matter all over before the note was made.

Hereupon Mr. Chadbourne objects to testimony respecting such understanding given on foregoing re-examinations, and moves to strike out the same as incompetent and immaterial.

Q. Was it not understood between you and your wife that you would have the benefit of this property as fully as if it had been deeded to you?

Objected to as incompetent and irrelevant.

A. No, sir; I had no such understanding.

Q. Have you not, in fact, had the benefit of this property as fully as if it had been deeded to you?

Objected to as incompetent and irrelevant and not strict cross-examination.

A. I can only say that I have handled the money and done the very best that I could do for her benefit and her children.

Q. Have you not, in fact, had the benefit of this property as fully as if it had been deeded to you?

A. I don't know that I can say any more than that.

162 Q. Had the property been deeded to you would you not then have used it for the benefit of your wife and children?

A. I certainly would, but probably would have taken more chances in investments.

NAT. D. MOORE.

I hereby certify that the foregoing deposition was taken before me on oath the day above written on oral interrogatories put by T. L. Chadbourne, Esq., counsel for the complainants, and by D. H.

Ball, Esq., solicitor for the defendants, and that the same was written down by me and read over to and subscribed by the witness in my presence.

Dated this 13th day of February, 1886.

[SEAL] T. W. DURHAM,
Notary Public in and for Marquette County.

163 *Copy of Notice.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, Infants, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Case now pending in the circuit court of the United States for the western district of Michigan, northern division. In equity.

GENTLEMEN: You are hereby required to produce a certain contract in writing, made in the year 1875, between J. H. McDonald and John McKay, on the one hand, and Nathaniel D. Moore, on the other hand, and signed by the said McDonald and McKay, or by them and by the said Moore, whereby the said McDonald and McKay agreed to convey to said Moore an undivided one-third part or interest in the northeast quarter of section sixteen, in township forty-seven north, of range forty-six west, in the county of Ontonagon and State of Michigan, or parol or secondary evidence of the contents of the same will be given and used.

Yours, etc., CHANDLER & GRANT,
Complainants' Solicitors.

To Messrs. Ball & Hanscom, defendants' solicitors.

164 (Endorsed.)

We hereby acknowledge receipt of notice, of which the within is a copy, this 13th day of February, A. D. 1886, at 2 o'clock p. m., but waive no objection as to the time of its reception.

BALL & HANSCOM,
Solicitors for Defendants.

Stipulation.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective solicitors, as follows:

Whereas the time for taking proofs in the above cause, both under the rule of practice and under stipulations, having long since elapsed; and

Whereas the solicitors for complainants desired to further cross-examine Nathaniel D. Moore, one of the defendants:

Now, therefore, in consideration that the solicitors for
165–168 defendants have produced the said Nathaniel D. Moore for further cross-examination at the city of Ishpeming, in the State of Michigan, on the 13th day of February, 1886, and that said Moore has been so cross-examined by complainants' counsel before T. W. Durham, notary public—

It is hereby agreed that the testimony adduced upon such cross-examination and the re-examination shall finally conclude complainants' proofs in this case, and so far as the same is strictly cross-examination and re-examination and the first four questions and answers of the cross-examination, which are not strictly cross-examination, may be read in evidence on the hearing, subject to such objections as are noted thereon; that said cause shall stand for hearing in the circuit court of the United States for the western district of Michigan, southern division, in equity, and that an order, if necessary, transferring said cause to said western district of Michigan, southern division, may be entered at any time *nunc pro tunc*, and that the said cause may be brought on to be heard before the said court, in the said western district of Michigan, on the 2d day of March, A. D. 1886, or as soon thereafter as the court will hear said cause, without further notice: Provided, however, That if the same cannot be heard by said court at Grand Rapids, then the same shall stand for hearing before the circuit court for the northern division of said western district of Michigan, at the next May term thereof, on the first day of said term or as soon thereafter as the same can be heard, without further notice.

Dated this 15th day of February, 1886.

CHANDLER & GRAY,
Solicitors for Complainants,
Per T. L. CHADBOURNE.
BALL & HANSCOM,
Solicitors for Defendants.

169 *Petition of the National Exchange Bank of Milwaukee. Filed December 26, 1885.*

In the Circuit Court of the United States for the 6th Judicial Circuit, Western District of Michigan, Northern Division. In Chancery.

CHRISTINA CRAWFORD and MARY ANN MONROE and JOHN D. MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

N. D. MOORE and HELEN MOORE, Defendants.

Intervening petition of the National Exchange Bank of the City of Milwaukee, State of Wisconsin.

To the honorable judges of said court:

Your petitioner, The National Exchange Bank of the City of Milwaukee, State of Wisconsin, respectfully presents unto your honors that it is a national bank duly organized under the laws of the United States and doing business as such national bank in the city of Milwaukee, State of Wisconsin, and a citizen of the State of Wisconsin; that on the twenty-fifth day of May, A. D. 1885, one James H. McDonald, of Escanaba, Michigan; John McKay, of Ashland, Wisconsin; Helen Moore, of Ashland, Wisconsin, a party defendant to this action; W. D. McIntyre, of Avison, Ontario, Canada; Edward Eschermann, of Milwaukee, Wisconsin; Gordon H. Gile, of Oshkosh, Wisconsin, and George M. Wakefield, of Oshkosh, Wisconsin, executed and delivered to the Penokee and Gogebic Development Company, a corporation duly organized and then and now existing under the laws of West Virginia, with full
170 power and authority to purchase, lease, and sell mining lands in the State of Michigan, and with full power and authority to conduct mining operations thereon and to accept said lease, and with full power to enter into said lease a certain mining lease, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof, and to which for the description of the property therein described and for greater particularity and certainty as to the terms thereof your petitioner prays leave to refer.

Your petitioner further represents that at the time when said lease was so executed and delivered said Helen Moore, defendant in the above-entitled suit, claimed to be and insisted that she was the legal and equitable owner of a one-sixth interest in the premises in said lease described, and that at said date and prior thereto she appeared of record to be the legal owner of said one-sixth interest.

Your petitioner further shows that by the terms of said lease the said Penokee and Gogebic Development Company were required to pay the royalties stipulated in said lease quarterly to your petitioner as the duly appointed depository of all the parties appearing of interest in said lease, to be distributed by your petitioner in proper proportion to the owners of said property, the lessors as aforesaid.

Your petitioner further shows that the premises described in said lease are situated within the sixth circuit of the United States and within the western district of the State of Michigan and the northern division thereof, and that at a date unknown to your petitioner and prior to the execution of said lease the said Christina Crawford and Mary Ann Monroe and John D. Monroe, by their next friend, Claudius B. Grant, the complainants in the above-entitled suit, filed their bill against said N. D. Moore and Helen Moore, defend-
171 ants in the above-entitled cause, which said bill is now pending in said court, and that your petitioner is informed and verily believes that the said above-named defendants have made answer thereto, and your petitioner avers, on information and belief, that in said bill the said complainants therein claim to be entitled to the one-sixth undivided interest in the said premises, in said lease and in said bill described, claimed to be owned by the said Helen Moore, and ask this honorable court to decree a conveyance thereof by the said defendants, N. D. Moore and Helen Moore, to them, the said complainants, and that, as your petitioner is informed and believes, there was no direct allegation in said bill nor any issue framed in said cause which specially related to the royalties accruing from time to time under said lease, all which will, with more particularity and greater certainty, appear from the records now on file in said court, to which records your petitioner craves leave to refer.

Your petitioner further says that, in accordance with the terms of said lease, royalties became due and payable from the said Penokee and Gogebic Development Company to your petitioner, as such depository as aforesaid, on the 15th day of September for the three months immediately preceding said last-named date, and on the 15th day of December for the three months immediately preceding said last-named date, and that the said royalties have been duly paid to your petitioner, as such depository under said lease, by said Penokee and Gogebic Development Company, the lessee under said lease.

And your petitioner further says that the said royalties so paid on the 15th day of September, 1885, have been properly distributed by your petitioner and paid by it to the said lessors under said lease without any objection from the complainants in the above-entitled suit.

172 Your petitioner further represents unto your honors that the royalties which were due and payable under said lease on the 15th day of December, 1885, have been duly paid to your petitioner, as such depository, by the said Penokee and Gogebic Development Company, and have been duly distributed to the said lessors under the said lease, with the exception of one-sixth thereof, which your petitioner now retains for the reasons hereafter stated, and that said one-sixth of the said royalties amounts to the sum of four thousand one hundred and eight and $\frac{21}{100}$ dollars ($4,108.21), which is now in the possession of your petitioner as such depository.

Your petitioner further represents that the said Helen Moore threatens to begin legal proceedings against your petitioner to recover the one-sixth so, as aforesaid, claimed to belong to her, and that the

said complainants in the said above-entitled suit are now threatening to bring suit against your petitioner for the said one-sixth of the royalties so paid as aforesaid and so claimed by them as aforesaid, and have notified your petitioner in writing not to pay the same to the said Helen Moore, and that both the said complainants and the said defendants in the above-entitled suit demand of your petitioner one-sixth of all the royalties accrued and to be paid to your petitioner as such depository under said lease, and that your petitioner further represents that while acting as a mere depository of said one-sixth of the royalties that accrue under said lease and all those that may hereafter accrue under said lease, and having no interest of any kind whatever therein, is threatened with legal proceeding of a vexatious character, and which will entail great expense and trouble upon your petitioner, wholly without fault on the part of your
173 petitioner, and while the conflicting interests of the said complainants and the said defendants in the above-entitled cause to the said one-sixth interest in said premises described in said lease and to one-sixth of the royalties accruing under said lease can all be authoritatively and properly settled by this court in the above-entitled suit, the said court having jurisdiction of the same and of the respective parties in interest.

Your petitioner further represents unto your honors that it has always been willing to pay the amount of such royalty to such person or persons as should be lawfully entitled to receive the same and to whom it could pay the same in safety, and your petitioner hereby offers to bring the same into this court as the court shall direct.

Your petitioner further represents that it does not in any respect collude with either the complainants or the defendants in the above-entitled cause touching the matter in controversy between them, nor is it in any manner indemnified by said complainants or said defendants, or either of them, nor has it intervened in the above-entitled suit at the request of the defendants or the said complainants in the above-entitled cause, or either of them, but merely of its own free will and to avoid being molested, vexed, and harassed touching the matters contained herein.

Your petitioner further represents unto your honors that on the 15th day of March, A. D. 1886, further royalties will accrue under the said lease, and, as your petitioner is informed and believes, will be paid under the terms of said lease to your petitioner, as such depository, by the said Penokee and Gogebic Development Company, as the lessee aforesaid, and that further royalties thereunder will accrue and be payable and be so paid to your petitioner
174 by the said lessee on the 15th day of the month following the termination of each and every quarter thereafter in accordance with the terms of said lease.

And your petitioner further represents that one-sixth of the royalties so paid on the said 15th day of December, A. D., 1885, to your petitioner, as such depository as aforesaid, and one-sixth of all the royalties hereafter accruing will be and are claimed by the said complainants and the said defendants in the above-entitled suit, re-

spectively, and that your petitioner is unable to determine to which of them respectively the said one-sixth of said royalty paid in December as aforesaid and of the royalties hereafter to be paid under said lease does of right belong and is payable.

Your petitioner further represents that it is willing and desirous that the said one-sixth of all such royalties may be paid to such of the parties herein to whom the same shall, in the judgment of this court, appear of right to belong.

For as much as it appears from the premises that your petitioner is a mere stakeholder or depository of the moneys or royalties which have been paid and may hereafter be paid to your petitioner under said lease, and that your petitioner has no personal interest of any kind whatever in said fund or in the matter in controversy between the parties to said suit, and that your petitioner is threatened with vexatious and expensive litigation in reference to the matters aforesaid, and that this honorable court has already jurisdiction of the lands covered by said lease and of all the parties interested and laying claim to the one-sixth of said royalties as aforesaid, and that the payment of said royalties or rental is a mere auxiliary or incidental fund to the property now in controversy in this court between
175 the parties aforesaid, and the determination of the proper and final disposition of said fund is not only properly but exclusively within the jurisdiction of this court, and that your petitioner has no adequate remedy at law and is remediless in the premises unless through the interference and protection of this honorable court:

Now, therefore, your petitioner prays that it may be allowed to file its intervening petition in the above-entitled cause, and that it may be made a party to the above-entitled suit for an adjudication of the matters referred to in its petition and the protection of its position as depository as aforesaid and for full directions, both interlocutory and by final decree, in the disposition of one-sixth of the funds which have already been paid and which will hereafter accrue, and that the filing of this petition shall be and constitute the making of your petitioner a party to said suit for the purposes aforesaid and an appearance in said cause, and that this petition may stand as the pleading of your petitioner in the premises, and that either an order be entered directing your petitioner to pay said sum of four thousand one hundred and eight and $\frac{21}{100}$ dollars, being one-sixth of said royalties so paid to your petitioner by the said lessee into said court until the further order of this court, and that upon such payment by your petitioner your petitioner may be relieved from all further liability and responsibility in the premises, and that in the final decree which may be entered herein your petitioner shall be directed as to the disposition of the one-sixth of the royalties thereafter received by it, if any, during the life of said lease, and that by this order this honorable court restrain the complainants and defendants in the suit aforesaid and each of them and the Penokee and
176 Gogebic Development Company and their and each of their agents, servants, and attorneys and all other persons claiming by, through, or under them from in any manner whatever in-

terfering with the payment by your petitioner into this court of the said one-sixth of said royalties, as determined by said order, and one-sixth of all royalties hereafter paid to it, or, if the immediate granting of such order shall not seem meet to your honors and agreeable to equity, then that an order may be immediately issued, returnable at such time or place as your honors may designate and for such service of this petition and any other papers upon the parties in interest as your honors may fix and determine, directing the complainants and defendants and each of them in the above-entitled action and the Penokee and Gogebic Development Company to show cause, if any they have, why an order should not be entered by your honors directing your petitioners to pay the said sum of four thousand one hundred and eight and $\frac{21}{100}$ dollars, being one-sixth of said royalties so paid to your petitioner on or about the fifteenth day of December as aforesaid, and to pay one-sixth of all royalties hereafter accruing under said lease and paid to your petitioner by the said lessee into said court until the further order of the court, and that upon such payment by your petitioner your petitoner may be relieved from all further liability and responsibility in the premises, and that in the final decree which may be entered herein your petitioner shall be directed as to the disposition of the one-sixth of the royalties hereafter received by it, if any, during the life of this lease, and that until the hearing of said order to show cause the said complainants and defendants and each of them and the said Penokee and Gogebic Development Company and their and each of their agents,
177 servants, and attorneys be restrained from in any manner whatever interfering with the retention by your petitioner of the one-sixth of the said royalties paid into its hands on or about the said fifteenth day of December, A. D. 1885, and from bringing any lawsuit against your petitioner for said royalties and from taking any other or further steps in any lawsuit, if any has been begun, relating to said one-sixth interest in said royalties, and for such other, further, and additional relief as to your honors may seem meet and agreeable to equity and good conscience, and that upon a final hearing your petitioner may be decreed its costs in this behalf most wrongfully sustained.

And your petitioner will ever pray, etc.

THE NATIONAL EXCHANGE BANK
OF MILWAUKEE, WIS.,
By W. G. FITCH, *Cashier.*
By H. S. BOUTWELL, *Its Solicitor.*

HENRY S. BOUTWELL, *Of Counsel.*

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. G. Fitch, being duly sworn, on oath says that the petitioner, The National Exchange Bank of the City of Milwaukee, is and for many years last past has been a national bank, duly organized under the laws of the United States and doing business in said city

178 of Milwaukee, and that he is and for many years last past has been the cashier of said bank, and as such an officer of said bank is familiar with and has charge, so far as said bank was concerned, of the matter referred to in the aforesaid petition, and makes verification of said petition in behalf of said bank and as such officer; that he has heard read the foregoing petition and knows the contents thereof, and that the same are true with the exception of those matters and things therein stated to be on information and belief, and as to those matters and things he believes them to be true, and he further swears that the said bank has exhibited the said petition in said court without any fraud or collusion by or between it and the complainants and the defendants in the aforesaid entitled cause or any or either of them, and has not exhibited its said petition at the request of said parties or either of them, and further states that the said bank has exhibited its said petition with no intent but to avoid being sued or molested by the said parties to said suit, who are proceeding or threatening to proceed for a recovery of said moneys from your said petitioner; and further affiant sayeth not.

W. G. FITCH.

Subscribed and sworn to before me this twenty-fourth day of December, 1885.

GRANT FITCH,
Notary Public.

179 EXHIBIT "A."

Whereas on the 15th day of January, A. D. 1883, James H. McDonald, John McKay, and Helen Moore, as parties of the first part, and Charles L. Colby, as party of the second part, executed a certain agreement, duly recorded in the registry of deeds for the county of Ontonagon and State of Michigan, on the 22nd day of January, 1883, in volume 2 of Miscellanies, on pp. 598 to 612; and whereas such dealings have been had between the parties to that agreement that said Charles L. Colby is willing to, and hereby does, waive his right to claim any conveyance to himself by said first parties pursuant of said contract in consideration that said first parties make, execut*ive*, and deliver this present lease to the Penokee and Gogebic Development Company; and whereas said Charles L. Colby hereby declares that the execution and delivery by said first parties of the said lease to the Penokee and Gogebic Development Company is in full satisfaction of the agreement of said first parties with him, and in token whereof hereto sets his hand and seal:

Now, therefore, this indenture, made this 25th day of May, A. D. 1885, between James H. McDonald, of Escanaba, Michigan, an owner of an undivided eight twenty-fourths ($\frac{8}{24}$) interest in the premises hereby demised; John McKay, of Ashland, Wisconsin, an owner of an undivided four twenty-fourths ($\frac{4}{24}$) interest in said premises; Helen Moore, of Ashland, Wisconsin, an owner of an undivided four twenty-fourths ($\frac{4}{24}$) interest in said premises; W. D. McIntyre, of Avison, Ontario, Canada, an owner of an undivided four twenty-fourths ($\frac{4}{24}$)

interest in said premises; Edward Asherman, of Milwaukee,
180 Wisconsin, an owner of an undivided two twenty-fourths ($\frac{2}{24}$) interest in said premises; Gorden H. Gile, of Oshkosh, Wisconsin, an owner of an undivided one twenty-fourth ($\frac{1}{24}$) interest in said premises, and George M. Wakefield, of Oshkosh, Wisconsin, an owner of undivided one twenty-fourth ($\frac{1}{24}$) interest in said premises, and the Penokee and Gogebic Development Company, a corporation created, organized, and existing under and by virtue of the laws of the State of West Virginia, party of the second part, witnesseth:

That said first party, for and in consideration of the rents, royalties, covenants, and agreements hereinafter mentioned and contained on the part of the said party of the second part, its successors and assigns, to be had, observed, and performed, has demised and leased, and by these presents does demise and lease, unto said party of the second part, its successors and assigns, the following tract or parcel of land situated in the county of Ontonagon and State of Michigan, described as follows:

The northeast quarter ($\frac{1}{4}$) of section sixteen (16), in township forty-seven (47) north, of range forty-six (46) west, for mining iron ore and such other minerals as are found mixed with iron ore, and for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore which is or which hereafter may be found in, on, or under said land, together with the right to construct all buildings, make all excavations, ditches, railroads, drains, wagon roads, and other improvements upon said premises which are or may become suitable or necessary for the mining or removing of iron ore from the premises, with the right, during the existence of this lease, to cut and use the timber found upon said
181 premises so far as may be necessary for fuel (other than smelting purposes) and for the construction of buildings required in the operation of any mine or mines found on the premises hereby demised, as also the timber required for drains, tramways, supports, railroads within said mine or mines or connecting said mine or mines with the main line or lines of railroad over or upon which said ore may be transported, and for furnishing suitable boarding-houses and other buildings requisite for the due and proper accommodations of its employés, for the term of thirty (30) years from and after the date of this indenture.

Said party of the second part may erect buildings, put in engines and machinery, build roads, and do such other things on the premises as may be necessary or proper to carry on said mining, but all such engines, machinery, buildings, and other improvements shall form part of the realty when put up or erected: Provided, That at any time within the term or termination of this lease, by notice or limitation, the party of the second part, by paying up all arrearages which may then be due or become due, owing or payable, to said party of the first part, their executors, administrators, heirs, survivors, or assigns, of this lease, may within said term, within sixty (60) days after such termination of this lease, remove such buildings, engines,

machinery, tramways, and rails on any track put in by said party of the second part, but not otherwise nor after said time.

From and after the date hereof and until the first day of November, A. D. eighteen hundred and eighty-eight, said second party shall, in the manner hereinafter provided, pay a royalty of forty (40) cents per gross ton of two thousand two hundred and forty pounds
182 avoirdupois on all iron ore removed from said premises above described, and shall pay such royalty on at least ten thousand gross tons in each and every year, and in like proportion for any part of a year, whether such quantity is mined or not, in quarter-annual payments during said time above limited: Provided, That if in any such one year or part thereof more iron ore is thus paid for than is actually removed in such year or part thereof the iron ore so paid for and not removed may be removed in any subsequent year or part thereof thereafter during the term of possession of said second party without other payment therefor, but such iron ore so permitted to be removed must be in excess of the stipulation of ten thousand gross tons to be removed annually or in the like proportion for any part of a year, as hereinbefore mentioned.

From and after the first day of November, A. D. eighteen hundred and eighty-eight, and thenceforth during the life of this lease, the party of the second part shall pay a royalty or rent of fifty (50) cents per gross ton of two thousand two hundred and forty (2,240) pounds avoirdupois on all iron ore thereafter removed from said premises, and from and after said day shall pay royalty on at least ten thousand (10,000) gross tons in each and every year during the term of this lease; and in case such quantities are not mined said party of the second part shall, nevertheless, pay royalty on not less than ten thousand tons in quarter-annual payments: Provided, That if in any one or more years more iron ore is thus paid for than is actually removed in such year or years the iron ore so paid for and not removed may be removed in any subsequent year during the continuance of this lease without other payment therefor, but such iron ore so permitted to be removed must be in excess of the stipulation of ten thousand gross tons to be removed annually, as hereinbefore mentioned.

183 All mines discovered or optioned on said lands shall be in good faith, according to the lessee's best judgement, worked up to their full paying capacity during the term of this lease.

The party of the second part shall, on or before the fifteenth (15) day of each month, furnish to said party of the first part a written statement of all ores so removed from said premises during the preceding calendar month, and such statements shall be certified by the proper agent of said party of the second part having knowledge of the facts and, whenever possible, shall be accompanied by duplicate shipping receipts of the railroad showing weights of the railroad company's scales over whose tracks said iron ore shall be shipped; and such statements and weights shall be used as a basis for making the quarterly payments herein provided, and the weight of all ore weighed upon the scales of said railroad company shall be deemed *prima facie* correct, but each party hereto shall at all reasonable

times have the right to test the accuracy of such scales, and actual errors in such weight, if any, when ascertained shall be corrected in accounts hereunder.

Said second party shall pay said rent or royalty in quarter-annual payments, on the fifteenth (15) day of the month following the termination of each quarter, for and upon all iron ore removed from said premises during the preceding quarter, at the National Exchange Bank, in the city of Milwaukee, or such other bank or place as the parties hereto shall mutually agree from time to time, and request said bank to place such payments when and as made to the credit of the party of the first part or of their agent by them in writing to said second party duly designated, and it is agreed that after
184 such designation shall have been made by said first party any and all payments made into said bank to the credit of such designated agent shall be conclusively deemed to be payment thereof to said first party, their executors, administrators, heirs, successors, and assigns, until such designation shall have been formally revoked in writing, given said first party, and some other agent shall have been in like manner and form designated as the party to whose credit such payment shall be made at the counter of said bank.

The party of the second part shall, in due and timely season, pay all taxes and assessments, ordinary or extraordinary, general or specific, which may be assessed or levied on said lands, iron ore, or improvements on said lands for and during the term of the continuance of this lease from and after the date of the execution thereof.

The party of the second part may at any time surrender and terminate said lease by executing and delivering unto said bank or said designated agent or to said party of the first part, their executors, administrators, heirs, successors, or assigns, a written surrender or release thereof, in proper form for record in the office of the register of deeds in the county of Ontonagon, and by paying up all arrearages for rent or royalty that may be due or owing up to the time when such release takes effect, and said lease shall thereupon, in sixty (60) days after the delivering of such written surrender and payment of such arrearages, if any, of royalty or rent as aforesaid cease and absolutely determine.

All mines of iron ore shall be opened, worked, and left in reasonably good order and workmanlike condition at the termination of this lease, and said party of the second part shall not remove or impair any support, timbers, frame-works, shafts, or ditches nec-
185 essary or proper for the use and maintenance of such mines or approaches thereto, and the rock, earth, and rubbish removed by said party of the second part shall, so far as possible, be dumped in such place or places as not unnecessarily to interfere with the future working of the mines in said lands after the termination of this lease.

Said party of the second part shall have the right at all times to build and operate one or more railroads over or across said lands or any portion thereof, with a right of way one hundred (100) feet wide for the track that it may so build and operate, without let or hindrance from said party of the first part and without paying any com-

pensation therefor, but such railroad shall not be so built as materially to interfere with the mining operations carried on in said premises.

Said party of the second part shall have the right and privilege to use the timber on said premises for purposes of doing effectively the mining and other work by this lease authorized, but not for fuel in blast or smelting purposes.

The covenants, agreements, and conditions of this lease shall run with the land and shall be binding upon the successors, sub-lessees, and assigns of the party of the second part.

If upon the expiration of the terms of this lease the party then holding the estate of the party of the second part desires a continuance of the same, said party of the first part bind themselves, their heirs, assigns, executors, administrators, and successors, to extend to the party then holding the estate of said second party as aforesaid this mining lease of said premises on the same terms as are contained in this lease in all respects except as to the amount of royalty per gross ton to be paid for the iron ore mined or removed from
186 said premises, which said royalty shall be fifty (50) cents per ton unless the parties thereto shall then mutually otherwise agree.

Whenever and if this lease is terminated, either by notice or limitation, the party of the second part shall and will quietly and peaceably leave, surrender, and yield up the said premises unto the party of the first part, their heirs and assigns; but if it shall so happen that the royalty or rent above reserved or any part thereof be behind or unpaid at the times or on the day above mentioned for the payment thereof, or in case said taxes or assessments are not paid in due or timely season, or in case of the non-performance of any of the covenants made by the said party of the second part at any of the times mentioned for the performance thereof, then and from thenceforth it shall and may be lawful for said party of the first part, their successors, administrators, heirs, executors, and assigns, in and to the said demised premises or any part thereof, in the name of the whole, to re-enter, using such reasonable force as may be necessary, and the same to have again, re-enter, repossess, and enjoy; and the said party of the second part, its successors, sub-lessees, or assigns, and all others, tenants or occupiers of the said premises hereby demised or any part thereof, thereout and therefrom utterly to expel, put out, and remove, and, after such re-entry has been made, this lease shall wholly cease and determine and thereby become null and void as it respects the covenants to be performed by said party of the first part: Provided, further, That the lease shall not be declared forfeited and such entry shall not be made by said party of the first part, their successors, assigns, heirs, executors, or administrators, for non-payment of the royalties or rents until the expiration of ten (10) days' written demand for payment of such royalty or rents which
187 are in default shall be made by said party of the first part, their executors, administrators, heirs, successors, or assigns, to and upon said party of the second part, its successors or assigns, by serving said written demand upon said second party, by delivery

thereof at said bank or place where said quarterly rent was payable, or by service thereof personally upon the party actually holding the estate of said party in the premises.

The parties of the first part hereby reserve for themselves, and to their heirs, executors, administrators, and assigns, the right to plat and sell the surface land of the northeast quarter section sixteen (16), township forty-seven (47) north, of range forty-six (46) west for town lots, subject, however, to the right of said second party hereinabove granted to cut and remove all timber therefrom, and to mine and remove all minerals thereon and thereunder, and subject to the right of said second party to lay and construct railroad tracks over the same, and especially said first party agrees not in any way to interfere with the tracks and right of way of the Milwaukee, Lake Shore & Western railroad as now constructed over said property, and in case said first parties exercise the right above reserved, either by platting said land or selling the same for town lots, said second party shall thereafter be relieved from the payment of all taxes and assessments levied upon the land so platted and sold or any portion of the same.

In witness whereof the parties hereto have hereunto interchangeably set their hands and seal the day and year first above written.

JAMES H. McDONALD. [SEAL.]
JOHN McKAY. [SEAL.]
HELEN MOORE, [SEAL.]
By NAT. D. MOORE, *Her Attorney-in-Fact.*

188 EDWARD ASCHERMAN. [SEAL.]
GORDON H. GILE. [SEAL.]
GEORGE H. WAKEFIELD. [SEAL.]
W. D. McINTYRE, [SEAL.]
By JOHN McKAY, *His Attorney-in-Fact.*
PENOKEE AND GOGEBIC DEVELOPMENT COMPANY.
[CORPORATE SEAL.] CHAS. L. COLBY, *President.*
CHAS. L. COLBY. [SEAL.]

HOWARD MORRIS,
JOSEPH L. COLBY,
As to all but W. D. McIntyre, Penokee and Gogebic Development Company, and Charles L. Colby.

HOWARD MORRIS,
JOSEPH L. COLBY,
As to Penokee and Gogebic Development Company, W. D. McIntyre, and C. L. Colby.

Attest: EDWIN H. ABBOTT, *Secretary.*

189 STATE OF WISCONSIN, } ss:
County of Milwaukee, }

On this 26th day of May, A. D. 1885, personally appeared before me the above-named James H. McDonald, John McKay, Nat. D.

Moore, Edward Aschermann, Gordon H. Gile, and George M. Wakefield, to me severally known to be the persons described in and who executed the foregoing instrument, and the said James H. McDonald, John McKay, Edward Aschermann, Gordon H. Gile, and George M. Wakefield severally acknowledged the same, and said Nat. D. Moore acknowledged that he executed the same as the free act and deed of said Helen Moore and as the free act and deed of himself, as well, individually as the attorney-in-fact of said Helen Moore.

Witness my hand and notarial seal the day and year first above written.

[SEAL.] HOWARD MORRIS,
Notary Public, Milwaukee County, Wis.

190 STATE OF WISCONSIN, } *ss:*
County of Milwaukee, }

On this first day of June, A. D. 1885, personally appeared before me Charles L. Colby, Edwin H. Abbot, and John McKay, who, being first by me severally duly sworn, did depose and say, the said Charles L. Colby and Edwin H. Abbot, that they were, respectively, president and secretary of the Penokee and Gogebic Development Company, and that the seal of said company was attached hereto by authority of said company, and they acknowledged the execution hereof to be the free act and deed of said company.

I further certify that Charles L. Colby acknowledged the execution hereof to be his free act and deed for himself individually, and that said John McKay acknowledged the execution hereof to be the free act and deed of said W. D. McIntyre, and of himself as attorney-in-fact of said McIntyre; and I do further certify that said Charles L. Colby, Edwin H. Abbot, and John McKay, who subscribed the foregoing instrument, are severally personally known to me.

Witness my hand and notarial seal the day and year above written.

[SEAL.] HOWARD MORRIS,
Notary Public, Milwaukee County, Wis.

191 & 192 *Order.*

In the Circuit Court of the United States for the Sixth Circuit, West. District of the State of Michigan, Northern Division. In Chancery.

CHRISTINA CRAWFORD *et al.*, Complainants,

v.

N. D. MOORE *et al.*, Defendants.

The National Exchange Bank of Milwaukee has leave to file the petition hereto annexed in the above-entitled cause and to be made a party therein for the purposes in said petition stated, and it is hereby ordered that the filing of said petition shall be the entry of

appearance of said National Exchange Bank in said cause and shall be the pleading of said bank therein.

Dated December 26th, 1885.

S. L. WITHEY,
District Judge.

Due service of a copy of the within acknowledged this 4th day of January, A. D. 1886.

BALL & HANSCOM, *Attorneys.*

193 *Complainants' Petition. Filed Nov.* 8, 1886.

In the Circuit Court of the United States for the Sixth Judicial Circuit, Western District of Michigan, Northern Division. In Chancery.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Their Friend, Claudius B. Grant, Complainants,

v.

W. D. MOORE and HELEN MONROE, Defendants.

To the honorable judges of said court:

Your petitioners, the complainants in the above-entitled suit, respectfully represent that said cause was brought to a hearing at Marquette, in the State of Michigan, before said court, on testimony taken out of court by commission and deposition at a regular term of said court continued and held in the month of July last, Hon. George R. Sage, a district judge of the United States, presiding; that after listening to the argument of said suit by the solicitors and counsel for the respective parties said judge took the
194 same under advisement and announced that he would consider the same in conjunction with the Hon. Howell E. Jackson, United States circuit judge of said circuit in Cincinnati, Ohio, and that an opinion would be rendered therein by said judges in conjunction; that on or about the 25th day of September 1886, an opinion was filed in the said court and cause, written by the said Hon. George R. Sage, concurred in by the said Hon. Howell E. Jackson, in favor of the complainants in said cause and against, the defendants therein, whereby the land in dispute in this suit was awarded to and decided to belong to the complainants therein, and by which opinion it was directed that a decree should be made for a conveyance to complainants, as prayed for in said bill, and for rents and profits of the land in question in said suit from the date of filing the original bill in the State court from which this cause was removed on the application of the defendants, and that against the amount of said rents and profits the sum of two hundred and forty dollars, being the amount of a certain promissory note, should be deducted; that no decree under said opinion and decision has as yet been drafted, settled, or filed.

Your petitioners refer to the proceedings in said cause and all of

them on file in this court and make the same a part of this petition and pray for leave to read the same on the hearing hereof; that on the 26th day of December, 1885, the National Exchange Bank of Milwaukee, in the State of Wisconsin, a citizen of Wisconsin and a bank- incorporation organized and existing under what is known as the national bank act, filed its intervening petition in this suit, and
195 that on the 26th day of December, 1885, the Hon. S. L. Withey, then one of the judges of said court, entered an order upon said petition of said bank and in said cause, a copy of which is hereto attached, marked "Exhibit B," and made a part hereof, and that in and by said order said judge directed that said bank should be made a party in said cause for the purposes in said intervening petition stated, and that the filing of said intervening petition should be the entry of appearance of the said bank in the said cause and a pleading of said bank therein; and your petitioners aver that said intervening petition was duly filed in said cause under said order, and that the said bank thereby became a party in and to the same; and your petitioners further aver that on said last-named date, to wit, the 26th day of September, 1885, the said court granted a further order, as prayed for in said intervening petition of said bank, a copy of which said order is hereto attached, marked "Exhibit A," and made part hereof; and your petitioners further represent that in accordance with the last said order copies of said petition marked "Exhibit A" and of said orders marked "Exhibits B and C" were duly served upon the defendants in said cause and upon these petitioners, the said complainants in said cause, in accordance with said order.

Your petitioners represent that neither your petitioners, the said complainants, or either of them have, and upon information and belief that neither of the said defendants has, filed any answer or pleading to said intervening petition or taken any issue thereon to this day, and that both the said complainants and said defendants are in default thereof. These petitioners represent in this behalf that the facts in said intervening petition are true as therein stated, and
196 that these petitioners did not intend to answer said petition, but to confess the same, and, as petitioners verily believe, said defendants also intended to confess the same and by their inaction have done so; and your petitioners are advised and believe that at the time of the hearing of this suit hereinbefore mentioned said intervening petitioner was entitled to and ought to have had the relief prayed for in its intervening petition by confession or default.

Your petitioners further show that in and by said order marked "Exhibit C" said judge ordered and commanded the said complainants and the said defendants in said suit and each of them to show cause, if any they or either of them had, before one of the judges of of said court, at chambers, in the city of Grand Rapids, State of Michigan, on the second day of March, 1886, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel could be heard, why an order should not be entered in this suit directing said intervening petitioner to pay into said court during the continuance

of said suit and until final disposition of the same all the royalties which were in its possession or which might thereafter be paid to it as depository claimed by the said defendants under the lease mentioned and set forth in said intervening petition; and the court therein further ordered that complainants and defendants in this suit be restrained in the then meantime from any and all interference with the retention by said intervening petitioner of the said royalty so claimed by the said defendants which were at that time in the possession of the intervening petitioner or which might thereafter come into its possession as such depository, and that said restraining order should be continued in force until such time as said order to show cause could be fully heard and determined by said court.

197 And your petitioners further show unto your honors that said intervening petitioner, by its attorney, H. S. Boutelle, duly appeared in said Grand Rapids pursuant to the terms of said order on the second day of March, 1886, at ten o'clock in the forenoon of that day, and that the said complainants and defendants, by their solicitors and counsel, respectively, also appeared at said time and place ready to argue and for the purpose of arguing the said suit and all the matters involved therein before the Honorable John Baxter, then one of the judges of said court, but that said suit was not argued and determined then and there for the reasons to be stated; that the said Boutelle brought to the attention of the court the matter of said intervening petition and of said order to show cause, and that the said judge thereupon expressed the opinion verbally that said suit had not been properly removed by defendants from the State court of Michigan, wherein the same had been originally brought by the complainants, and for that reason refused to hear argument in said suit in any branch of it; that no order whatever in said suit or in any branch of it was entered in said court at that time or at that term, whereby these petitioners aver that said restraining order remained and continued in full force and effect; that notwithstanding the premises said suit and all parts and branches thereof remained pending in the said Federal court, and that in the month of July, 1886, at Marquette, in the State of Michigan, said suit came on duly to be heard, as hereinbefore stated, with the consent of all parties hereto.

Your petitioners further aver that by reason of the premises at the hearing of said suit at Marquette the intervening petitioner was

198 and remained a party to said suit, and was entitled to the relief prayed for in said petition as against the other parties to said suit. Your petitioners further show, upon information and belief, that said bank believed, as it had a right to believe, that the allegations of its petition were admitted and confessed by all parties to the suit, and that on the final determination of the suit the prayer of the petition would be granted as of course and incorporated into the final decree. Your petitioners further allege that it was and is of great importance to them and for the protection of their rights that the prayer of said intervening petition should be granted, and that they supposed it would be granted, and in this behalf they

further allege that the defendant, Helen A. Moore, has, as your petitioners are informed and believe, no property whatever within the jurisdiction of this court, and that, as your petitioners are informed and believe, she has no property anywhere sufficient in amount to make her answerable or responsible for the amount of royalties which are the rents and profits in the hands of said intervening petitioner as depository under said lease at the time of the rendering of said opinion, which amount was then as your petitioners are informed and believe, about the sum of $15,000. Your petitioners have made inquiries as to the amount of rents and profits which will probably be paid to said intervening petitioner as depository arising out of the one-sixth undivided interest in land covered by this suit, and on such inquiries and investigation allege it to be true that the royalties likely to be so paid and deposited for the present year and for the next ensuing four years will be the sum of not less than $80,000, and that without an order and decree of this court in this suit providing for the preservation of said royalties, should the decree ordered herein be appealed from by the defendants,
199 the whole of said amount of money is likely to be lost to your petitioners on account of the pecuniary irresponsibility and want of property and assets of the said Helen A. Moore, she holding the legal title of said one-sixth undivided interest in said property and claiming the right to receive all of the said royalty belonging thereto.

Your petitioners further show that said royalties are paid under lease for ore taken out of the land in litigation, and that each year during the continuance thereof an enormous amount of said ore will be removed, the amount removed and to be removed the present year being, as your petitioners are informed and believe, about 240,000 tons, and the amount likely to be mined and removed within the next four years being, as your petioners are informed and believe, a like or greater amount in each year, and that the result of not preserving, in the manner hereinafter mentioned, to your petitioners said royalties may be to leave your petitioners, should the decree to be rendered herein be appealed from and said decree be affirmed in the supreme court, with property worth little or nothing in consequence of such removal of ore; that your petitioners desire and believe that they are entitled on the settlement of the decree to be filed here under said opinion to have retained for them by said intervening petitioner pending the appeal or paid into court by it in this suit, if appeal shall be taken, all royalties now in the hands of said intervening petitioner arising out of the one-sixth interest in land in controversy in this suit, together with all such royalties that shall in the future come into the hands of said intervening petitioner pending the proceedings on appeal from the decree to be rendered herein.

200 Your petitioners further show that early in the month of September, A. D. 1886, and after the hearing and submission of this suit in manner aforesaid, without any notice whatever to your petitioners or their solicitors or counsel and without, as your petitioners are informed and believe, any notice whatever to said

intervening petitioner or its solicitor or counsel, the solicitors for the defendants, Nathaniel D. Moore and Helen A. Moore, wrongfully procured and had entered an order, in the month of September, 1886, in this court, at Marquette, vacating the order to show cause, and the restraining order, dated December 26th, A. D. 1885, and without the consent or knowledge of your petitioners or of the said bank; and your petitioners allege that said action was had and obtained without any notice or knowledge whatsoever on the part of your petitioners, as before alleged, and that the fact that said order was obtained and entered only came to the knowledge of your petitioners on the eighth day of October, 1886; and your petitioners allege, on information and belief, that knowledge of said order was received by said intervening petitioner on, and not before, that date; and your petitioners annex hereto, in proof of said want of notice and knowledge on the part of said intervening petitioner, the affidavit of the said H. S. Boutelle.

Your petitioners further show that said wrongful order aforesaid was obtained, not from the judge who heard this suit as aforesaid, nor from the Hon. Howell E. Jackson, who took part in the decision of the suit, but from the Hon. Henry F. Severns, one of the judges of this court, holding a term thereof at said Marquette, who was then unaware and was not advised by counsel for said defendants that said order, Exhibit "B," had been made in said suit and was then in full force, as your petitioners are informed and believe; and your petitioners fur-
201 ther represent unto your honors that within a short time after the procuring of said wrongful order as aforesaid, to wit, on or about the twentieth day of September, A. D. 1886, the said Helen A. Moore began a suit at law in the circuit court for the county of Milwaukee and the State of Wisconsin against the said National Exchange Bank, intervening petitioners as aforesaid, to recover against said bank all the royalties retained by it under the former order of said court arising out of the one-sixth interest involved in said suit and decided to belong to your petitioners as aforesaid, which suit is still pending. A copy of the summons and complaint in said action is hereto attached, marked "Exhibit D," and made part hereof. And your petitioners further aver that they fear that unless this court will grant to your petitioners the relief hereinafter prayed for, and require said royalties to be paid into this court or otherwise preserved for your petitioner pending the final disposition of this cause, that the said bank will be required to pay said royalties to the said Helen A. Moore, and that the same will be wholly lost to your petitioners for the reasons aforesaid. And, further, your petitioners aver that they have good reason to believe, and do believe, that, unless restrained by the order of this court, the said Helen A. Moore will, when other royalties are paid to said bank as depository under said lease, sue for and collect the same, and that the same will be wholly lost to your petitioners for the reasons aforesaid.

Considering the premises, your petitioners pray—

First. That your honors issue an order, directed to the defendants

in this cause, their attorneys, solicitors, and agents, and each and every one of them, prohibiting and forbidding them to take
202 part in the settlement of the decree in this cause and from taking any steps toward appealing the same after the settlement of the decree, and from taking any steps whatever in this cause, before or after decree is settled or filed therein, until said suit brought as aforesaid against said bank for recovery of said royalties in said circuit court for Milwaukee county is first discontinued and dismissed and proof thereof furnished to your honors.

Second. That the defendants show cause before —— ——, at chambers in the ——, on the — day of ——, 1886, at — o'clock in the ——, why an order should not issue restraining them and each of them from bringing any suit or proceedings at law or in equity in any court for recovery of said royalty or from interfering in any way with the retention of said royalties by said bank until the decree in this suit shall have been settled and filed.

Third. That said order, so wrongfully obtained as aforesaid, may be set aside and resigned, and that the intervening petition of said bank and the orders made thereon, hereinbefore recited, stand and remain in as full force and effect as if said wrongfully rescinding order had never been made until the further order of the court.

Fourth. And for such other or further relief as to your honors may seem meet and proper in the premises.

CHRISTENA CRAWFORD,
MARY ANN MONROE,
JOHN D. MONROE,
By their next friend, CLAUDIUS B. GRANT.

203 WESTERN DISTRICT OF MICHIGAN, *ss:*

T. L. Chadbourne, being by me duly sworn, says that he is the counsel of the parties complainant named in the cause above entitled, and that he has read and knows the contents of the foregoing petition by said parties complainant subscribed; that he has personal knowledge of the facts occurring in the litigation set up in said petition and the parties complainant have not such knowledge; that he is authorized to verify this petition in their behalf, and that the contents therein are true, except as to those matters set up in said petition on the information and belief of the petitioners, and that as to such matters he believes the petition to be true.

T. L. CHADBOURNE.

WESTERN DISTRICT OF MICHIGAN, *ss:*

Claudius B. Grant, being duly sworn, says that he is one of the solicitors of the parties complainant and named in the cause above entitled, and that he has read and knows the contents of the foregoing petition by said parties complainant subscribed; that he has personal knowledge of the facts occurring in the litigation set up in said petition and the parties complainant have not such knowledge; that he is authorized to verify this petition in their behalf, and that the contents therein are true, except as to those matters set up in

said petition on information and belief, and that as to such matters he believes said petition to be true.

C. B. GRANT.

Subscribed and sworn to before me this sixth day of ——, A. D. 1886.

T. F. GIDDINGS,
Clerk Circuit Court, Kalamazoo County, Mich.

204 EXHIBIT "B."

Order.

In the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division. In Chancery.

CHRISTINA CRAWFORD *et al.*, Complainants,
v.
N. D. MOORE *et al.*, Defendants.

The National Exchange Bank of Milwaukee has leave to file the petition hereto annexed in the above-entitled cause and to be a party therein for the purposes in said petition stated; and it is hereby ordered that the filing of said petition shall be the entry of appearance of said National Exchange Bank in said cause and shall be the pleading of said bank therein.

Dated Grand Rapids, December 26th, 1886.

S. L. WITHEY,
District Judge.

205 EXHIBIT "C."

Order to Show Cause and Restraining Order.

In the Circuit Court of the United States for the Sixth Circuit, Western District of Michigan, Northern Division. In Chancery.

CHRISTINA CRAWFORD *et al.*, Complainants,
v.
N. D. MOORE *et al.*, Defendants.

On reading the petition of the National Exchange Bank of Milwaukee, intervening petitioner herein, and now filed in said cause, it is hereby ordered that Christina Crawford, Mary Ann Monroe, and John D. Monroe, by their next friend, Claudius B. Grant, complainants in the above-entitled cause, and Helen Moore and N. D. Moore, defendants in the above-entitled cause, and each of them, show cause, if any they or either of them have, before one of the judges of said court at chambers, in the city of Grand Rapids and State of Michigan, on Tuesday, the second day of March, 1886, at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard,

why an order should not be entered in the above-entitled action directing the National Exchange Bank of Milwaukee to pay into this court, during the continuance of said cause and until the final disposition of the same, one-sixth of all royalties now in its
206 possession or which may hereafter be paid to it as depository under the lease mentioned and set forth in its petition filed in said cause.

It is further ordered that the said N. D. Moore, Helen Moore, Christina Crawford, Mary Ann Monroe, John B. Monroe, Claudius B. Grant, be restrained, and each of you are hereby restrained, from any and all interference with the retention by said National Exchange Bank of Milwaukee of one-sixth of said royalties claimed by said Helen Moore now in its possession or which may hereafter come into its possession as depository under said lease until the above order to show cause can be heard and determined, and that a copy of this order and of said petition be served upon each of the parties aforesaid within ten days from the date of this order personally or upon their solicitors.

Grand Rapids, December 26th, 1885.

S. L. WITHEY,
District Judge.

EXHIBIT "D."

Summons.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

HELEN MOORE, Plaintiff,

v.

THE NATIONAL EXCHANGE BANK, Defendant.

To the said defendant:

You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service,
207 and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of this complaint, of which a copy is herewith served upon you.

JENKINS, WINKLER, FISH & SMITH,
Plaintiff's Attorneys,
P. O. Address, 401 *East Water Street, Milwaukee, Wis.*

Circuit Court of Milwaukee County.

HELEN MOORE, Plaintiff,

v.

THE NATIONAL EXCHANGE BANK, Defendant.

The plaintiff complains and alleges—

First. That the defendant is a corporation duly organized and existing under the banking laws of the United States of America, doing business at the city of Milwaukee, in the State of Wisconsin.

For a first cause of action, prior to the 24th day of July, 1886, the defendant received to the use of this plaintiff the sum of six thousand eight hundred fifty-four and $\frac{62}{100}$ dollars, and, upon request, refused to pay the same over to this plaintiff.

For a second cause of action, that prior to the twentieth day of September, 1886, the defendant received to the use of this plaintiff the further and other sum of eight thousand three — fourteen and $\frac{41}{100}$ dollars; that the plaintiff demanded payment of said last-mentioned sum of money from the defendant, and that payment was refused.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen thousand one hundred sixty-nine and
208 $\frac{3}{100}$ dollars and interest on $6,854.62 from July 24th, 1886, and interest upon $8,314.41 from this date, besides the costs of this action, to be taxed.

September 20th, 1886.

JENKINS, WINKLER, FISH AND SMITH,
Attorneys for Plaintiff.

MILWAUKEE COUNTY, *ss:*

A. A. L. Smith, being duly sworn, says that he is a member of the firm of Jenkins, Winkler, Fish & Smith, the attorneys for the plaintiff herein; that the foregoing complaint is true, to his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true; that the reason why the foregoing verification is not made by the plaintiff is because she is not within the county of Milwaukee, where the action is pending and where plaintiff's attorneys reside. Affiant further says that such knowledge is derived from conversations with the officers of the defendant and agent of the plaintiff.

A. A. L. SMITH.

Subscribed and sworn to before me this twentieth day of September, 1886.

CHARLES F. WILD,
Notary Public, Milwaukee County, Wisconsin.

209 *Deposition of Henry S. Boutell.* (*Filed Nov.* 8, 1886.)

UNITED STATES OF AMERICA,
Northern Division of the Western District of Michigan, } *ss:*

In the Circuit Court of the United States for the Sixth Judicial Circuit of the Northern Division of the Western District of Michigan. In Equity.

CHRISTINA CRAWFORD *et al.*, Complainants,
v.
N. D. MOORE *et al*, Defendants.

STATE OF ILLINOIS,
County of Cook, } *ss:*

Henry S. Boutell, being duly sworn, says that he is a resident of the city of Chicago, county of Cook, and State of Illinois; that he is attorney and solicitor for the National Exchange Bank, of the city of Milwaukee and State of Wisconsin, in a certain intervening petition filed by said bank in the above-entitled cause; that he had no notice and, as he is informed and believes, said bank had no notice of a certain order entered in said cause at a term of court holden at Marquette, in the State of Michigan, on the tenth day of September, A. D. 1886, which order provided that the order theretofore entered in the matter of said intervening petition, directing the defendants in said cause to show cause why the prayer of said
210 petition be not granted and restraining them from prosecuting the said bank in any suit at law to recover moneys deposited with said bank, being rentals of the property involved in said litigation, be vacated; that the first knowledge that he obtained of said vacating order and, as he is informed and believes, the first knowledge that said bank obtained of the same was on, to wit, the ninth day of October, A. D. 1886; and affiant further says that the said Helen Moore, one of the defendants in the above-entitled cause, instituted her action at law against said bank on the twentieth day of September, 1886, in the circuit court of Milwaukee county, State of Wisconsin, to recover from said bank the moneys held by it as royalty or rental accruing on the interest in said lands involved in the above-entitled cause, which said suit is still pending and undetermined; and affiant further says that said bank has at all times since the time of its intervening petition herein been and now is ready and willing to abide by the decree of this honorable court in the premises, and has at all times since said time held and now holds all sums of money paid to it, as set forth in said petition, for the purpose of abiding by such decree whenever and if made; and affiant further says that said bank stands upon its petition aforesaid and relies upon its standing in this court as a defence to the action so as aforesaid brought against it in said circuit court for Milwaukee county, and that the issues involved in said action can be wholly determined in this cause and are necessarily involved herein.

HENRY S. BOUTELL.

Subscribed and sworn to before me November third (3rd), A. D. 1886.

[SEAL.] JESSE B. BARTON,
Notary Public.

211 *Finding by Judge Sage. Filed Sept. 26th,* 1886.

Circuit Court of the United States, Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Their Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Respondents.

The bill is filed to compel the conveyance to the complainants, the widow and minor children of John Monroe, deceased, of the undivided one-sixth part of one hundred and sixty acres of mineral lands situated in Ontonagon county, Michigan, and located and entered by the respondent, Nat. D. Moore, upon whose application the patent was issued from the State land office at Lansing in January, 1875, to James H. McDonald and John McKay, who furnished the purchase-money under an arrangement or understanding that Moore was to have an undivided interest in consideration of his services in exploring the land and discovering upon it indications of iron ore. The arrangement was altogether oral. One witness testifies that it was reduced to writing and signed, but this is denied by the parties to it, and his testimony does not contain any definite statement of the contents of the writing. The arrangement
212 was so loose and indefinite in its terms that, aside from any objection resting on the statute of frauds, it would not have warranted a decree for specific performance. Whether Moore was to have one-third or one-fourth interest in the lands does not clearly appear. There seems to have been nothing more than a mutual understanding that McDonald and McKay would do "what was right," having reference to a recognized custom to give to "explorers" one-fourth, one-third, or, in some cases, one-half interest in the lands located by them.

On the 18th day of October, 1875, Moore, who was then unmarried, executed and delivered to John Monroe a deed in fee simple, with covenant of seizen, against incumbrances, and of general warranty, for an undivided one-sixth interest in said lands, and the deed was duly recorded December 20th, 1875. The consideration for this deed was two hundred and fifty dollars, of which Monroe paid ten dollars in cash and for the residue gave his promissory note to Mr. Moore, payable one year after its date.

At the time of the execution of this deed Moore told Monroe that he had not received his deed from McDonald and McKay, but expected to receive it, and that it was probably made out then.

In 1875 or 1876, at what precise date does not appear, a deed

from McDonald and McKay and their wives to Moore for an undivided one-third interest in the land was drawn, signed by McKay, and left by him with a Mr. Viele under instructions not to deliver it to Moore without orders from him, McKay. This deed was not signed by Mrs. McKay, and it is not clear that it was executed by McDonald and wife, although it is a fair inference that it was, but McDonald directed McKay not to deliver the deed to Moore until he had heard further from him.

213 No further directions were ever given. Moore was indebted to McDonald, whose intention it was to keep back the deed until he was paid. He had no knowledge of the drawing of the deed nor of its partial execution. It was never delivered to him, and the testimony is that it has been lost, or rather that Viele (who is not a witness) stated that he had lost it.

In December, 1880, McDonald and McKay conveyed an undivided one-third interest in the land to the respondent, Helen Moore, wife of the respondent, Nat. D. Moore. This conveyance was made at Moore's request in discharge of the original arrangement or understanding, no consideration excepting one dollar passing at the time. Mrs. Moore was not present at the time of the execution of this deed, but she had been informed by her husband that it was to be made to her, and had full notice of his deed to Monroe. Moore did not have the deed made to himself because of his deed to Monroe, who died intestate, in Colorado, in August, 1878, and because he had learned that that deed had been recorded, and, as he himself testifies, he expected that Mrs. Monroe would make trouble.

The complainants aver in the bill that McDonald and McKay held the legal title to the lands, one undivided third thereof, in trust for Moore under an arrangement made by and between them and Moore at or before the time when they acquired their title, and that in order to execute said trust and vest the title to his third in Moore they, with their wives, at some time between January, 1873, and March, 1881, executed and delivered to him at his request a deed of conveyance therefor; that said deed was suppressed or destroyed by Moore and wife, who also procured the deed to Mrs. Moore,

214 for the purpose of cutting out complainants' title to said one undivided sixth of said land. The prayer of the bill is that Mrs. Moore be compelled to convey to them the one undivided sixth of said lands in the proportion to which they are entitled as heirs of Monroe, and for such other and further relief as may seem meet and proper.

By amendment the complainants allege and charge that said conveyance by McDonald and McKay and their wives to Mrs. Moore was made at the instigation of Moore, with intent and purpose to defraud complainants out of the estate conveyed by Moore to Monroe, by lodging the apparent legal title in her, but for his benefit or use. They charge that in equity and good conscience the transaction is as if the conveyance had been made direct to Moore, and that he and his wife are estopped by his conveyance to Monroe from asserting or claiming any title to said one undivided sixth, the title to which is in them by virtue of the premises. They further allege

that Moore was unmarried when he made his conveyance to Monroe, and that Mrs. Moore took the conveyance to her, for which she paid no consideration, with full notice and knowledge of complainants' right under the deed from Moore to Monroe.

Counsel for respondent insist that the complainants have failed to make out the case stated in the bill, which they contend rests upon the averment of a trust in McDonald and McKay in favor of Moore, its execution by making and delivering to him a deed, afterwards suppressed or destroyed, whereby and by reason of Moore's deed to Monroe the legal title to an undivided one-sixth interest passed to the complainants, and that inasmuch as the proof negatives the averment the bill must be dismissed for want of averment to support the case attempted to be made from the proofs at the hearing.

215 The rule that the proof and the pleading must correspond is a familiar one, but it is to be applied equitably and not rigidly, especially when it is appealed to on behalf of a party having all the time of the progress of the cause the facts in full possession, and therefore not misled by a pleading, which, although inaccurate or mistaken as to some of the details, yet contains averments sufficient to support a claim for the relief prayed for. Texas *v.* Hardenberg, 10th Wallace, 68, cited by defendant's counsel, is in point. There it was asserted on behalf of the defendant that upon the bill, which was for an injunction to restrain the defendant from asking payment of certain bonds of the United States belonging to the complainant, but in the possession of the defendant, he could in no event be held to account for the proceeds of the bonds, the prayer of the bill being only for relief by injunction against receiving payment of the bonds or coupons and by decree for delivery of them specifically to the complainant. Chief Justice Chase in his opinion said it was plain enough that the principal object of the bill was to prevent the collection of the bonds by the defendant and to compel the surrender of them to the State of Texas, but that there were averments and interrogatories looking to the proceeds as well as to the bonds themselves.

Admitting that the allegations and interrogatories did not assert the right of the complainant to the proceeds with absolute directness and distinctness, he adds:

"The bill might have been better drawn, but we think it would savor of extreme technicality to refuse to see in the bill enough relation to the proceeds of the bonds to warrant relief in this respect under the general prayer."

216 So in this case the main object of the bill is to enforce the alleged trust by compelling a conveyance from the fraudulent grantee of the trustees, but there is enough in the bill and the amendment to warrant relief without reference to the trust if the averments are sustained by the evidence.

It is next urged on behalf of the defendants that Moore's deed to Monroe did not vest in him any equitable interest in the land for the following reasons:

1. Because of the failure to prove a written agreement between Moore and McDonald and McKay for Moore's interest, and therefore

Moore had no equity which he could convey to Monroe. Section 6179, Howell's Statutes of Michigan, provided that no trust or power over or concerning lands or in any manner relating thereto shall be "created, granted, assigned, surrendered, or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same or by some person thereunto by him lawfully authorized by writing."

This proposition of law is undoubtedly correct.

2. Because section 5569 of Howell's Statutes provides that no trust shall result from the payment of the consideration by one person for a grant made to another.

But, independent of the statute and under the general doctrine of resulting trusts, no trust resulted in favor of Moore from the fact of his purchasing the lands and taking the title in the name of McDonald and McKay. Aside from the consideration suggested, that he waived his equity, if he had any, by himself causing the patent to be issued to them, his services in exploring the land formed
217 no part of the consideration of the deed from the State. That was exclusively a money consideration, wholly furnished by the grantees. Moore had nothing but an oral agreement for an interest in the land in consideration for his services. Even conceding that his communication to McDonald and McKay of his discovery of indications of ore was part performance, the agreement, it has been stated, was too indefinite to be enforced.

That if Monroe acquired no equities in the land by his deed, if McDonald and McKay held the land free from all equities and incumbrances, their grantee, Mrs. Moore, will so hold it, regardless of notice or want of consideration; that the fact of her being married and being the wife of Moore does not affect her title. Conceding that she paid nothing for the land, that she was fully advised of all the contract relations existing between her husband and Monroe, and that she took the title at her husband's request, her position is as secure and her title as free and perfect as though she were a *bona fide* purchaser for value; that, construed in the most favorable light for complainants, Mr. Moore has simply been substituted in the place of McDonald and McKay, and can be held to no other or different trust than that of her grantors.

This is admirably put, but to get at the real question it is necessary to take into consideration certain other facts developed by the testimony in connection with those above: 1. That Monroe by his deed acquired a strong equity against Moore, who was bound by his covenant to acquire the title if he could do so, not for the benefit of his wife, but for Monroe's benefit. 2. That McDonald and McKay waived the statute of frauds (which lays it out of this part of the case, so far as everybody else is concerned), and waived also all defects in the agreement (which put an end to them), either
218 of which, as they testify, they never thought of relying upon against Moore's claim, which, in the spirit of their understanding, that they were to do "what was right," they fully recognized, and, as soon as he had settled his indebtedness to McDonald,

were ready and willing to convey to him his one undivided third interest in the land.

3. That Moore thereupon, for the purpose of defrauding Monroe's heirs (leaving out for the present whether the sale to Monroe has been rescinded), suggested to McDonald and McKay that the conveyance for the consideration moving from him be made to his wife, and that they, as it was a small matter to them whether they decided it to him or to her, so McKay testifies, and on account of their agreement with him, so McDonald testifies, at Moore's request, made for the reason that his deed to Monroe had been recorded, that Monroe was dead, and they expected that Mrs. Monroe would make trouble, so Monroe testifies, made the conveyance to Mrs. Moore, to whom Moore, as he testifies, had confided a detailed statement of the entire scheme.

Now add two or three well-recognized propositions of equity, and we shall come to an easy solution of the matter. 1. A deed of conveyance, with covenant of seizin and of general warranty, of land to which the grantor has no title is good in equity as a contract for a conveyance, and title afterwards acquired by the grantor enures to the benefit of the grantee or his heirs. 2. Equity looks through forms to substance, and will regard this transaction as if McKay and McDonald had conveyed Moore's interest directly to him, and he then had conveyed it, without consideration, to his wife, she having notice of the equity in favor of Monroe's heirs. 3. "The
219 court of equity has from a very early period decided that even an act of Parliament shall not be used as an instrument of fraud, and if in the machinery of perpetrating it an act of Parliament intervenes the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act and imposes upon him a personal obligation because he applies the act as an instrument for accomplishing a fraud.

In this way the court of equity has dealt with the statute of frauds, and in this manner it deals with the statute of wills. Lord Westbury in McCormic *v.* Grogan, L. R., 4 H. L. C., 97. Trusts created by operation of law are expressly excepted from the Michigan statute of frauds, and the well-understood rule that the statute of frauds is not to be used as a cover for fraud has full play.

It results that, whether by operation of law Mrs. Moore holds one-half of the one-third interest conveyed to her in trust for the heirs of Monroe or whether by reason of the fraud perpetrated by her husband and herself against the heirs of Monroe equity imposes upon her a personal obligation, is immaterial. She is in the one predicament or the other. In either case there must be a decree compelling her to convey to them, unless Moorewas released from any equitable obligation to Monroe by transactions relating to the consideration for his deed to Monroe, and subsequent to the execution and delivery of that deed. This brings us to the branch of the defense next to be considered, which is that the sale by Moore to Monroe was rescinded.

This defense as set up in the answer is that Monroe paid, upon

obtaining his deed from Moore, only ten dollars in money, giving his note for two hundred and forty dollars, the remainder of
220 the price agreed upon; that Moore afterwards made an unsuccessful effort to obtain from McDonald & McKay a conveyance of his interest in the land; that at the time Monroe took his deed he gave Moore one hundred and forty dollars to enter land for him at the United States land office, if he could know of any that was desirable; that about six months thereafter Monroe, knowing that Moore had not obtained title, told Moore that he did not want an interest in the land, but wanted his note back and the money he had paid on the land, and also that which he had furnished to enter land, which was still unexpended; that thereupon Moore gave his note for one hundred and sixty dollars, and it was agreed that Monroe should quitclaim to him said land, and that he should cause Monroe's note for two hundred and forty dollars, which was then in possession of John McKay, a friend of them both, to be surrendered to him; that Monroe soon after went to Colorado, where he died, not having executed such quitclaim; that early in the summer of 1876, and before the death of Monroe, the complainant, Christina Crawford, then Mrs. Monroe, by the direction of her husband, applied to said McKay for said note, claiming that Moore had no title to the land and that there was no consideration for said note; that McKay, as he had been previously requested by Moore, thereupon delivered the note to her for Monroe, and the same was cancelled and has never been paid; that about a month thereafter Moore paid Monroe the ten dollars he paid upon said land, and soon afterward paid the remainder of said note for one hundred and sixty dollars.

No title having passed to Monroe by Moore's deed to him, his rights under it could have been abandoned or the contract
221 which the deed in equity imported could have been rescinded by patrol. The statute of frauds does not apply to such a case. (King *v.* Morford, 1 Sax., N. J. Eq., 274; Maxfield *v.* Terry, 4 Del. Ch., 618.

An objection was made to the testimony of Moore, who alone testified to the making of the contract of rescission, and who in the State courts would be incompetent, after Monroe's death, to testify in relation to transactions with him; but section 858, U. S. Rev. Stat., controls, and under that section he is clearly competent. His testimony is in conflict with his answer in many respects, and among them the following:

The one hundred and fifty dollars was not given him to enter land for Monroe, if he should know of any that was desirable, but for the entry of a specified tract which he told Monroe he had explored and found it to contain cobalt and nickel and a trace of tin, and which he assured him would be valuable. His excuse for not entering it is that when he went to the land office he found that it had already been entered, but he did not advise Monroe of that fact and he kept the money, which was an act of dishonesty and a fraud upon Monroe.

He fixes the time of making the contract of rescission, not as in his answer, at about six months after making his deed to Monroe, which

was executed October 19th, 1875, but in August or September, 1876, which was also after the time when, according to his answer, he had requested McKay to surrender the two hundred and forty dollar note. He testifies that Monroe's agreement was not to quitclaim to him the land, as is the averment of the answer, but to send the deed back; that he had not had it recorded. He admits that he did not request or authorize McKay to surrender the two hun-
222 dred and forty dollar note, and that it is not true that within a month he paid Monroe the remaining ten dollars of the purchase-money, and that the note for one hundred and sixty dollars was not finally paid until in June of 1882 or 1883, six or seven years after it was given, instead of "soon afterwards," as is averred in the answer.

Certain other facts disclosed by the record are pertinent in this connection.

1. In the latter part of 1875 or early in 1876 McKay wrote Monroe, in answer to an inquiry by letter, that Moore had no claim on the property and no deed for it; that it was owned by McDonald and himself.

2. When Monroe went to see Moore at the time Moore fixed for the contract of rescission he saw McDonald, who told him that Moore had no interest in the land and would not have until he paid him. Monroe's answer was that he cared nothing about the land, but he wanted to get his money from Moore, and his visit to Moore was to get his money, in whom he had evidently and very naturally lost all confidence.

3. Moore had at that time sent Mrs. McKay, with the two hundred and forty dollar note, to Houghton to negotiate it that he might raise money. McKay failed to accomplish her mission and left the note at Hancock with her brother, John McKay, and wife, and Moore not only gave no instruction for the surrender of the note to Monroe, but did not know of its surrender until a year afterward, when he learned it casually from McKay.

4. Although Moore lived within three or four miles of Monroe, until some time in 1878 he never called on him to return the deed or for a quitclaim; the reason he gives for this is that he thought he had got himself into trouble and made himself liable
223 by executing the deed to Monroe, and he "didn't want to stir it up more than was necessary." Admitting that he supposed if he got the deed back he would thereby be relieved from "liability, he flies to the excuse that the debt was not paid and he didn't want to urge him until the money was paid in full." The one hundred and sixty dollar note matured and was unpaid. Monroe left it with a magistrate for collection, to whom Moore paid small sums from time to time, amounting in all to about sixty dollars, prior to Monroe's death, in 1878, and then paid nothing more until the summer of 1882 or 1883, when the land had been sufficiently developed to make its very great value apparent.

His testimony discloses that he and his wife in June, 1883, conveyed one-half the interest deeded to her, for the consideration of twenty thousand dollars; that he collected the money and invested

a large portion of it in his own name. In the summer of that year or of the year before he met Mrs. Monroe, went with her to Ishpeming, to the magistrate who held the one hundred and sixty dollar note for collection, paid her expenses, and took up the note by payment with interest at ten per cent. from date, although, according to her own testimony, the note was without interest. He admits that at the time he made this settlement, which, by his own testimony, completed the performance or the agreement of rescission on his part, he said not a word to her about the outstanding deed to Monroe, which, according to his testimony, Monroe was to surrender, and, according to his answer, Monroe was to cancel by a quit-claim. Mrs. Monroe was then living in Canada.

The title to the land had been by Moore's manipulations conveyed to his wife. He may have thought the situation reasonably
224 safe, and yet that it was politic to pay the balance due on the one hundred and sixty dollar note, with something extra in the way of interest, so that Mrs. Monroe would return to Canada and leave him and Mrs. Moore undisturbed.

The entire series of these transactions has an ugly look, suggesting that Moore had no disposition to give up the note nor to pay Monroe what he owed him, and that the story of the agreement of rescission was an afterthought, coined when Monroe was in his grave and could not deny it.

His testimony is rejected, and the finding is that no agreement of rescission was made.

In the summer of 1876 Mrs. Monroe obtained the two hundred and forty dollar note from Mr. and Mrs. John McKay, to whom she stated that her husband sent her for it. They received it from Wm. McKay, to whom Moore had entrusted it for negotiation. Mr. John McKay at first declined to give it to her, for the expressed reason that it belonged to Moore and was not paid; but finally, yielding to her tears and protestations that the note was without consideration and that the deed from Moore to Monroe was worthless, he handed it to his wife, who was Mrs. Monroe's sister, and she gave it to Mrs. Monroe, who declared that, now she had the note, she was square with Moore and he could keep the land.

Mrs. Monroe's version is altogether different, but her testimony is so manifestly unreliable as to be entitled to little credence. She took the note home and gave it to her husband, and he retained it. After his death it passed into her possession, and it is attached to her deposition.

Monroe's receipt and retention of this note is not a bar to relief to complainants. It did not relieve him from liability to
225 & 226 pay it, nor did it affect Moore's right to collect it, because Mr. and Mrs. McKay had no authority, as he himself testifies, to surrender it. He could not by ratification make their surrender his surrender, because they not only had no authority from him, but they did not even profess to act for him. Saunderson *v.* Griffith, 5 B. & C., 909–915; Chitty on Contracts, 11th Amer. Ed., 24; Wharton on Agency and Agents, p. 62, and cases there cited.

Finally, the defense of laches is not sustained. Monroe had no

equity which he could enforce, so long as the title to the land remained in McDonald and McKay, and they did not convey to Mrs. Moore until December, 1880, more than two years after his death. As to the change in the value of the land resulting from its development, it is only necessary to refer to the fact that all the outlay and expense were incurred by the Cambria Iron Company, the lessee. It cost the owners of the land nothing. There was no unreasonable delay, after making of the deed to Mrs. Moore, in bringing this suit.

The decree will be for a conveyance to complainants, as prayed for, and for rent and profit from the date of filing the bill in the State court, from which this cause was removed, against which the amount due on the two hundred and forty dollar note will be allowed as a credit.

The circuit judge concurs in the reasoning and conclusion of this opinion.

September 23d, 1886.

GEORGE R. SAGE.

227 *Decree. Filed Dec.* 7, 1886.

In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD and JOHN D. MONROE and MARY ANN MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

At a term of said court held in the court-room in Marquette on the fifteenth day of July, 1886, being on adjournment of a regular term of said court appointed for the fourth day of May, 1886.

Present: Hon. George R. Sage, district judge of the southern district of Ohio, holding said court under designation by his honor Howell E. Jackson, circuit judge.

This cause came on to be heard and was argued by counsel; and thereupon, on consideration thereof, the said judge, to wit, on the twenty-fifth day of September, 1886, filed his opinion, finding the equities of this cause with complainants.

Wherefore, in accordance with said opinion and findings, it is now, at the special December term of this court, to wit, on the
228 seventh day of December, 1886, ordered, adjudged, and decreed as follows, to wit:

That the complainants herein, Christina Crawford, formerly Christina Monroe, widow of John Monroe, late of the State of Michigan, deceased, and John D. Monroe and Mary Ann Monroe, children of said Christina Crawford, formerly Monroe, by said John Monroe, her deceased husband, infants under the age of twenty-one years, are, and are hereby declared to be, as the heirs-at-law of the said John Monroe, deceased, the owners in equity of the land hereinafter de-

scribed, and are of right entitled to the legal ownership and possession of said land as against the defendants, Nathaniel D. Moore and Helen Moore, in this suit.

Said land is the undivided sixth part and interest in the northeast quarter of section sixteen (16), in township number forty-seven (47) north, of range forty-six (46) west, in the county of Ontonagon and State of Michigan, according to the Government survey thereof, which one-sixth interest aforesaid was sold by Nathaniel D. Moore, one of the defendants herein, to the said John Monroe, deceased, in his lifetime, and conveyed by the said Moore, then unmarried, to the said Monroe, by deed of conveyance bearing date October 19, 1875, and acknowledged by the said Nathaniel D. Moore on the 19th day of October, 1875, and duly recorded on the 20th day of December, 1875, in the register's office of said county of Ontonagon, in Liber R of Deeds, on pp. 105 and 106.

That the defendants, Helen Moore and Nathaniel D. Moore, make, execute, and deliver to the complainants, Mary Ann Monroe and John D. Monroe, a deed of conveyance of the one-sixth interest aforesaid, subject to the dower of the complainant, Christiana
229 Crawford, as widow of said John Monroe, deceased, as aforesaid, therein, and that in case of their failure to make, execute, and deliver the same within thirty days from the entry of this decree, then any master in chancery of this court may make, execute, and deliver such deed to complainants, Mary Ann Monroe and John D. Monroe, and that said deed, when executed and delivered, shall have the same force and effect as if executed and delivered by the defendants, Helen Moore and Nathaniel D. Moore.

That all the royalties, rents, and profits which have heretofore accrued from said one-sixth interest in said land since the commencement of this suit and all which may hereafter accrue therefrom belong to and are the property of the complainants, and that the said defendants, Helen Moore and Nathaniel D. Moore, account to the complainants for all the rents and profits received by them or either of them from the land hereby decreed to be conveyed to the complainants, less the sum of two hundred and forty dollars, with interest from November 1st, A. D. 1876, and that it be referred to W. S. Hill, U. S. circuit court commissioner of Marquette aforesaid, to ascertain and compute the amount of rents and profits so received by the said defendants and report the same to this court without delay; and, further, that he take proof of the particulars of any lease, transfer, or any other disposition of said land or any part thereof pending this suit, and to report the facts thereof to this court, to the end that the court, on making final decree herein, may be advised of the proper order to be made in respect to such lease, transfer, or other disposition.

It appearing from the files of this cause that the National Exchange Bank of the City of Milwaukee, Wisconsin, a national
230 bank duly organized under the laws of the United States and doing business as such in said city of Milwaukee, has filed an intervening petition in this cause wherefrom it appears that said bank is the depository of and now holds certain rents and profits

arising out of the land hereby decreed to be conveyed, which, as to the one-sixth interest in said land decreed to be conveyed, it is ready and willing to pay over to the party entitled, and it appearing to the court that the complainants herein are entitled to said rents and profits so held by said bank to the extent of one-sixth interest in said land, it is ordered, adjudged, and decreed that said bank pay into the registry of this court, to be distributed among the complainants according to law, all rents and profits on deposit in said bank arising out of and belonging to the one-sixth interest in said lands and herein decreed to be conveyed, and that said defendants in like manner pay into the registry of this court the amount of rents and profits received by them or either of them when so ascertained, and that the said bank pay over from time to time into the registry of this court in like manner all the rents and profits that may come into its hands as depository arising out of said one-sixth interest.

And it is further ordered and decreed that complainants herein be let into possession of said one-sixth interest as against the defendants, and that the parties defendant herein and any person or persons who, since the commencement of this suit in the circuit court for the county of Ontonagon and State of Michigan, the State court from which this suit was removed to this court, have come into possession thereof under them or either of them deliver possession thereof to the complainants in this suit.

231 & 232 It is ordered, adjudged, and decreed that the said defendants be, and they are hereby, perpetually enjoined from bringing any suit against said bank to recover the royalties or rents now in possession or which may hereafter come into its possession, or against any person from whom such royalties may be or become due, until the further order of this court, and that said defendant, Helen Moore, be, and she is hereby, perpetually enjoined from prosecuting the suit now commenced by her and still pending in the circuit court of Milwaukee county, State of Wisconsin, for the recovery of the royalties or rents now in said bank.

It is ordered, adjudged, and decreed that said defendants pay the costs of this suit, to be taxed, and that in default thereof execution issue therefor, as well as execution for the amount of rents and profits which said defendants or either of them shall be found to have received when ascertained.

HENRY F. SEVERENS,
District Judge.

233 UNITED STATES OF AMERICA:

Petition and Allowance of Appeal to Supreme Court. (*Filed Jan. 4th, 1887.*)

In the Circuit Court of the United States for the Sixth Circuit and the Northern Division of the Western District of Michigan. In Equity.

CHRISTINA CRAWFORD and JOHN D. MONROE and MARY ANN MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

To the Supreme Court of the United States:

The appeal of Nathaniel D. Moore and Helen Moore, defendants above named, respectfully shows—

1. That a final decree was rendered and entered in said cause by said court on the seventh day of December, A. D. 1886, and was averse to the said appellants.

2. That the matter in dispute in said cause between the said complainants and the said defendants exceeded the sum and value of five thousand dollars.

234 3. The said appellants conceive themselves aggrieved by said decree.

Wherefore said defendants pray an appeal to the Supreme Court of the United States from the decree of this court, that a citation may issue, and for such orders as may be necessary in effecting said appeal.

December 28th, 1886.

BALL & HANSCOM,
Solicitors for said Appellants.

Allowed:

H. F. SEVERENS,
District Judge, Western District of Michigan.

235 *Citation on Appeal. Filed January* 12, 1887.

UNITED STATES OF AMERICA, *ss:*

United States Circuit Court, Western District of Michigan, Northern Division. In Equity.

CHRISTINA CRAWFORD *et al.*, Complainants,

v.

NATHANIEL D. MOORE *et al*, Defendants.

To Christina Crawford, John D. Monroe, and Mary Ann Monroe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday in October next, an appeal having been allowed to the Supreme Court of the United States and an entry thereof having been made in the clerk's office of the circuit court of the United States for the western district of Michigan, northern division, in equity, in a certain suit heretofore heard and decided in said court, wherein you were complainants and Nathaniel D. Moore and Helen Moore were defendants, to show cause, if any there be, why the decree rendered in said cause and mentioned in said appeal
236 should not be reversed and the bill dismissed and speedy justice done to the parties in that behalf.

Witness the Honorable Henry F. Severens, for the time being presiding judge of the said court, this sixth day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

H. F. SEVERENS,
District Judge.

We hereby accept due service of a copy of the above citation. January 11, 1887.

CHANDLER & GRANT,
Solicitors for Complainants.

237 *Stipulation as to Appeal Bond., etc.* (*Filed January 10th*, 1887.)

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and the Northern Division of the Western District of Michigan. In Equity.

CHRISTINA CRAWFORD and JOHN D. MONROE and MARY ANN MONROE, by Their Next Friend, Claudius B. Grant, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Whereas a decree has been duly rendered and entered in the above-entitled cause directing that all the rents and royalties which have heretofore accrued and which shall hereafter accrue from the land involved in this case shall be paid into the registry of this court, to be distributed among the complainants according to law;

And whereas said defendants contemplate appealing said case to the Supreme Court of the United States:

Now, therefore, it is hereby stipulated and agreed by the parties hereto that if such appeal shall be taken by said defendants or
238 either of them, then said rents and royalties shall be paid into said registry during the pendency of said appeal in accordance with the terms of said decree and shall there remain until the final determination of said cause in the Supreme Court of the United States.

And it is further stipulated and agreed that in consideration of the deposit of said rents and royalties as above stated a bond in the

sum of two thousand dollars, with one good surety, shall be sufficient upon the taking of said appeal by the defendants or either of them.

December 21, 1886.

CHANDLER & GRANT,
Solicitors for Complainants.
BALL & HANSCOM,
Solicitors for Defendants.

239 *Bond on Appeal.* (*Filed Jan.* 10, 1885.)

UNITED STATES OF AMERICA :

The Circuit Court of the United States for the Northern Division of the Western District of Michigan. In Equity.

CHRISTINA CRAWFORD, MARY ANN MONROE, and JOHN D. MONROE, by Claudius B. Grant, Their Next Friend, Complainants,

v.

NATHANIEL D. MOORE and HELEN MOORE, Defendants.

Know all men by these presents that we, Nathaniel D. Moore, of the city of Ashland, in the State of Wisconsin, as principal, and John E. Burton, as surety, of the city of Milwaukee, in the State of Wisconsin, *as sureties* are held and firmly bound unto said Christina Crawford, Mary Ann Monroe, and John D. Monroe in the sum of two thousand dollars, to be paid to the said Christina Crawford, Mary Ann Monroe, and John D. Monroe, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-ninth day of December, A. D. 1886.

240 Whereas the above-named Nathaniel D. Moore and Helen Moore have taken an appeal to the Supreme Court of the United States from the decree rendered by the circuit court of the United States for the northern division of the western district of Michigan, in equity, in the above-entitled cause, on the seventh day of December, A. D. 1886:

Now, therefore, the condition of this obligation is such that if the above-named Nathaniel D. Moore and Helen Moore shall prosecute their said appeal to effect and answer to the costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

NATHANIEL D. MOORE. [SEAL.]
JOHN E. BURTON. [SEAL.]

The within bond is hereby approved in form and substance.

H. F. SEVERENS, [SEAL.]
District Judge, West. Dist. Mich.

STATE OF WISCONSIN,
Eastern District of Wisconsin, County of Milwaukee, } ss:

On this twenty-ninth day of December, 1886, before me personally appeared Nathaniel D. Moore and John E. Burton, to me known to be the persons named in the foregoing bond as principal and surety thereto, respectively, and who subscribed the same, and, being by me duly sworn, each for himself does depose and
241 say that he is worth five thousand dollars and upwards over and above all liabilities, encumbrances, liens, and exemptions, and that his property to the above amount and more consists of unincumbered real estate situated in the county of Milwaukee aforesaid.

In witness whereof I have hereunto set my hand and official seal the day and year first above written.

[SEAL.] HERMAN H. WALTERS,
Notary Public, Milwaukee County, Milwaukee, Wis.

STATE OF WISCONSIN,
County of Milwaukee, } ss:

OFFICE OF THE CLERK OF THE CIRCUIT COURT.

I, Christoph Paulus, clerk of the circuit court within said county, do hereby certify that Herman H. Walters, who subscribed the foregoing certificate of acknowledgement, was, at the time of taking such acknowledgment, a notary public within and for said county and duly authorized to take and certify the same by the laws of said State; that I am well acquainted with the handwriting of said Herman H. Walters and verily believe that the signature attached to the foregoing certificate is the genuine signature of said Herman H. Walters.

In witness whereof I have hereunto set my hand and affixed
242 the seal of said court, at Milwaukee, in said county and State, on this thirtieth day of December, one thousand eight hundred and eighty-six.

[SEAL.] CHRISTOPH PAULUS,
Clerk of Circuit Court as Aforesaid.

We are satisfied with the above bond and with the surety thereto, hereby consenting to the bond as it now stands, with one surety instead of two.

January 4, 1886.

CHANDLER & GRANT,
Solicitors for Complainants.

243 & 244 UNITED STATES OF AMERICA,
Western District of Michigan, Northern Division, } ss:

I, Francis M. Moore, deputy clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify and return that the annexed and foregoing is a full and complete copy of the proceedings, records,

and files in the case of Christina Crawford and Mary Ann Monroe and John D. Monroe, infants, by Claudius B. Grant, their next friend, complainants, *vs.* Nathaniel D. Moore and Helen Moore, defendants, heretofore pending in said court, in equity, and now pending in the Supreme Court of the United States on appeal;
245 that I have carefully compared said copy with the original records and files now remaining on file in this office; that it is a full and complete transcript therefrom and of the whole of said original records and files.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Marquette, in said district and division, this sixth day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

FRANCIS M. MOORE,
Deputy Clerk.

Endorsed on cover: W. Michigan C. C. U. S. No. 700. Nathaniel D. Moore, Nathaniel D. Moore, Junior, sole heir-at-law of Helen Moore, deceased, by his guardian, Nathaniel D. Moore, and John McKay, administrator of the estate of Helen Moore, deceased, appellants, *vs.* Christina Crawford, Mary Ann Monroe, & John D. Monroe. Filed September 19, 1887.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888. No. 700.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, Jr., sole heir at law of Helen Moore, deceased, by his Guardian, NATHANIEL D. MOORE, and JOHN McKAY, Administrator of the Estate of Helen Moore, deceased,

Appellants,

against

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

ARGUMENT FOR APPELLANTS.

BY

JOHN F. DILLON.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

INDEX.

PAGES.

Statement of the Case 1

Assignment of Errors 10

Argument 13

I. The Pleadings 13

II. McDonald and McKay held the land free from any equity 17

1. *They obtained an absolute title from the State of Michigan* 18

2. *No equity arose from the alleged understanding between McDonald and McKay and Moore* 19

A. No trust arose out of the understanding or acts of the parties 24

B. Oral evidence was inadmissible, hence, there was no legal proof of the understanding 26

Michigan Statute of Frands 26

C. Nothing to take the case out of the Statute of Frauds 30

Moore's services did not 33

D. Terms of the alleged understanding too indefinite to be enforced 38

E. The admissions of McDonald and McKay, and the so-called "waiver" of the Statute of Frauds 39

III. No trust arose out of the conveyance by McDonald and McKay to Mrs. Moore 43

A. *The conveyance to Mrs. Moore was valid as a gift, and is not impeachable* 46

The argument that the Statute of Frauds is not to be made a cover for fraud 50

B. *No fraud upon Monroe or his heirs* 55

Even if there were fraud, they have no right to the relief prayed for 61

Non-performance of an oral contract is not a fraud 63

C. *No trust resulted to Moore from the conveyance to Mrs. Moore* 68

Michigan Statute of Trusts 68

IV. Effect of the Deed from Moore to Monroe 70

A. *Mrs. Moore was not a party to the Deed, therefore, the Deed is immaterial* 79

B. *The Deed is not a contract to convey* 82

Equity does not treat a Deed or its covenants as a contract to convey 88

PAGE

C. *Even if the Deed were a contract to convey, it would not affect Mrs. Moore or the land in question*... 89

D. *Plaintiffs have no rights under the Deed, even against Moore*..... 90

Whether it be regarded:

(*a*) As a Deed..... 91

(*b*) As a contract to convey..... 92

V. THE RESCISSION AND ABANDONMENT OF THE CONTRACT OF SALE BY MOORE AND MONROE..... 98

I. *The evidence as to the Rescission and Abandonment, Failure to perform, Change in Value, &c*..... 99

II. *The law applicable thereto*..... 114

VI. THE PLAINTIFF'S CASE IS BAREEN OF ALL EQUITIES..... 125

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888, No. 700.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, JR., sole Heir at Law of Helen Moore, deceased, by his Guardian, Nathaniel D. Moore; and JOHN MCKAY, Administrator of the Estate of Helen Moore, deceased,

Appellants,

AGAINST

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE,

Appellees.

Argument of John F. Dillon for Appellants.

Statement of the Case.

THIS IS A BILL IN EQUITY brought by the appellees, the widow and heirs at law of one JOHN MONROE, deceased, against HELEN MOORE, then in full life, of whom the appellants are heirs at law and administrator, and in which her husband, NATHANIEL D. MOORE, was also made a defendant, claiming, on the grounds stated in the bill and amended bill of complaint (hereinafter re-

ferred to in Point I., *infra*, p. 13), that they had a title to an undivided $\frac{1}{6}$th interest in the N. E. $\frac{1}{4}$ of section 16, township 47, range 46, County of Ontonagon, Michigan, of which title in fee they had been fraudulently deprived by the defendants, HELEN MOORE (now deceased) and her said husband. At the hearing the complainants shifted their ground and claimed not a title but that they had an equity or right of some sort to get a title ; that the defendant Helen Moore had the legal title, and that the complainants' equity was such, owing to the alleged fraud of Moore and Mrs. Moore, the defendants, that the complainants had a right to have a court of equity take the legal title out of Mrs. Moore and decree it to them.

THE SUBSTANCE OF THE PLEADINGS will be hereafter stated in connection with the Point I., *infra*, p. 13 ; and it is sufficient here to say that the answer denied all the equity of the bill, and also alleged a rescission and abandonment of the contract out of which the complainants' alleged rights grew, and also alleged nonperformance on the complainants' part ; also laches, and change of value.

THE FACTS, so far as it is necessary here to state them (though they will be referred to more in detail in connection with the several points made in support of this appeal), are briefly as follows :

January 28th, 1875, the State of Michigan patented to one JAMES H. MCDONALD and one JOHN MCKAY, as tenants in common the northeast quarter of said section 16 *(Record, p. 78)*. It is undisputed that McDonald and McKay furnished the money which was paid to the State of Michigan for this land. How they came to enter it from the State is thus : The defendant Nat.

D. Moore was in the habit of exploring lands with a view to see whether they gave indications of mineral deposits. McDonald and McKay knew this, and McDonald had said to Moore, who conducted the explorations solely on his own account and without any employment by McDonald and McKay: "If you see anything that makes your eye water, let me know" *(Record, p. 12, fol. 24)*. Afterwards meeting McDonald, Moore advised him to enter from the State the quarter-section above described. For this purpose McDonald and McKay furnished Moore the money to pay for the land, and Moore went to Lansing, the capital, paid the money to the State, and the land was thereupon patented to McDonald and McKay. No fraud or mistake is alleged or claimed in respect to this patent, and the land was thus patented by the consent and direction of Moore. It was usual for persons entering land under such circumstances, to give to the person who furnished the information some interest in it, sometimes a quarter, sometimes a third, sometimes more, as might be agreed. McDonald and McKay testify that while there was no contract with Moore to give him an interest in this quarter section, yet they expected to do "what was right." There was no writing and no definite understanding (see Opinion of Court below on these Points, *Record, p. 134*). But the extent of interest, whether a quarter or a third or some other amount, was not defined; and it was not expected that they would give him or that he would receive an interest until certain other indebtedness of Moore to them or of one of them should be settled. I say there was no agreement in writing. Such is the testimony of McDonald, McKay and Moore, and such

was found to be the fact by the Court below. I scarcely think that, on this record, the contrary will be contended for by the appellees' counsel. Certain it is that no such writing was produced, and the feeble attempt by the testimony of one McIntyre to establish a writing of any kind, much less a written contract, hardly deserves serious consideration.

ORAL TESTIMONY WAS GIVEN, against defendants' objection on the ground that a proper foundation for secondary evidence had not been laid, to the effect that in the fall of 1875 McDonald and McKay had a deed drawn up and that it was left with one Viele, a notary public, with positive instructions not to deliver it until further directions from McDonald and McKay were given to that effect. This is what is known in the proofs as the Viele deed. Its execution never was completed and it was never delivered. The Court below so found, and there will, I think, be no serious contention that this finding was not correct (*Record, p. 135*). The bill of complaint was evidently drawn under the impression that the execution and delivery of this deed, or of some deed from McDonald and McKay to Moore, could be established. The case utterly miscarried on this decisive and controlling point.

On the 18th of October, 1875, MOORE MADE A DEED TO MONROE, on the expressed consideration of $250, for an undivided one-sixth interest in the aforesaid quarter section, with covenants of seizin, against incumbrances, and of warranty. The text of this deed is at pages 17 and 18 of the record. This is the interest which is in controversy in this suit. The history of this deed is given by Mr. Moore at pages 36 and 37 of the record. His testimony is confirmed by the testimony of Mrs.

Monroe (now Mrs. Crawford) on the same subject (*Record, p. 66, et seq.*). There were two separate transactions between Moore and Monroe on the said 18th of October, 1875, which are important. These transactions were disconnected at first, but afterwards became connected. Moore (*Record, p. 36*) discovered forty acres of school land (not the land now in question), which he thought contained minerals. He says (p. 37):

"I had no money myself at the time, and I went to John Monroe and told him if he wished to enter the land and give me a half interest I would furnish the minutes. He said he would be very glad to do it."

For that purpose he gave Moore $150. When that transaction was concluded Monroe said:

"'I would like very much to get an interest in that land that you and McKay and McDonald are into.' I said, 'All right; I will sell you a half of my interest for two hundred and fifty dollars. That was the consideration.' Then he says, 'I would like very much to take it, but you have got all the money I can spare at present.' And I was feeling pretty well over getting that money, and I told him I would take his note; $250 was the amount of the purchase. I told him then that I had not received my deed from McDonald and McKay, but that I expected to receive it and probably it was made out then. I didn't know anything about it. That was a very short time after we had entered it. He said that was all right; for me to give him a warranty deed. I done so. He paid me ten dollars. He said, 'I will give you ten dollars.' He gave me ten dollars, and the note was made for $240. That is all of that transaction."

The $240 note here referred to was produced at the trial by Mrs. Monroe, who had had possession of it for nine years. The text of it will be found on page 61 of the Record. After Monroe obtained this deed from Moore he made inquiries of McKay and McDonald as

to Moore's right in the land, when he would obtain a deed, &c.

McKay replied to Monroe's letter of inquiry: "That Mr. Moore had no claim in the property; that McDonald and I owned it; that Moore hadn't got any deed of it" (Record, p. 23, fol. 40).

McDonald testified (Record, p. 30, fol. 51): "He (Monroe) asked me if Moore had an interest in the land; I told him he would have when he paid me; he didn't have any interest in it yet."

Monroe became dissatisfied; and it is established by the disinterested testimony of McDonald (Record, p. 30) that in 1876 he declared that "he did not care about the land, and if he could get his money out of Moore he didn't want the land; it wasn't worth a cent anyway, and he would not have it."

Moore's testimony is to the same effect; and also that he and Monroe in 1876 rescinded the contract for the sale of this land. If Moore's testimony is credited, as it ought to be, since it is supported by the facts and circumstances in the case hereafter discussed, it is established by express testimony that the contract was rescinded. But aside from Moore's testimony the evidence of a rescission and abandonment of this contract on the part of Monroe, with the acquiescence of Moore, is, as the defendants claim, clearly established. The facts in this connection are collected and discussed in Point V., *infra*, p. 98 of this brief, and need not here be stated in detail. Certain it is that, in the summer of 1876, Mrs. Monroe, as shown by the disinterested testimony of Mr. and Mrs. McKay, obtained the possession of the $240 note, which fact she also admits in her testimony. According to the McKays' testimony, she stated, as part of the *res gestæ* upon

which she obtained the note, that her husband had sent her for it; that the land was worthless; that Moore had no title to it; and that she wanted the note. It is undisputed that she got it at that time, and also that she took it to her husband and informed him of it, and he told her to "put it by." Monroe died August, 1878. It is also undisputed that this note never was paid; that she and her husband retained the possession of this note from that time until the trial of this case in 1885, when she produced it. The Court below finds that it had never been paid and decrees its payment to be made out of the rents and profits of the land in controversy, or, as it is *obliquely* put in the opinion and decree, "that it be allowed as a credit against the rents and profits of the land in question." This, although no such case was stated or such relief asked for or suggested in the bill. A direct decree for the payment of this note could not be made, since the executor of Monroe was not a party—indeed no administration had been granted—and if it had not been for the accidental circumstance that there were rents and profits of the land in the possession of the Court arising *pendente lite*, it is difficult to see how the obstacle of decreeing this land to the complainants in the face of the undisputed fact that it had never been paid for could possibly have been overcome by the Court below. It is also undisputed on this record, that after Mrs. Monroe obtained this note neither she nor Mr. Monroe ever offered to pay it on the one hand, nor, on the other, did Moore, or any one for him, ever maintain that they had a right to it or to collect it.

Monroe never took any possession of the land; he

made no improvements thereon ; he never paid taxes upon it. After declaring that the land was worthless, that, that he didn't want it and "*wouldn't have it*" (p. 30), he moved away and took with him the $240 note which represented nearly the entire consideration for the land. His entire investment in this land, or upon it, or about it, was never but $10, which was afterwards repaid to him. The land was sold and conveyed for the taxes of 1875, '76 and '77, by deed dated June 7th, 1880, to one Frederick Ayer, who afterwards, on October 1st, 1881, conveyed whatever title he thus acquired to said James H. McDonald, who afterwards, June 21st, 1883, conveyed the same for the consideration of $75 to Mrs. Moore (*Abstract of title, in record, pp. 78–9*).

Previously to the date of the rescission of this contract between Moore and Monroe, it had been discovered that the 40 acres of school land for which Monroe had given Moore the $150 in money, had been entered by another party. This left Moore with $150 of Monroe's money. All matters between Moore and Monroe were in 1876 settled as follows : The contract for the sale of the $\frac{1}{6}$th interest in question in this suit was rescinded ; Monroe was to get back the $240 note, and Moore gave Monroe a note for $160 ; to wit, for the $150 in money which he had received to enter the 40 acres, and the $10 which had been paid at the date of the execution of the deed as part payment for the land now in question. This transaction in regard to the $160 note, though it may be disputed by the complainants *in argument*, was not disputed by them *in the proofs*, and is, as the defendants maintain, clearly established by the evidence quite irrespective of the

direct testimony of Mr. Moore on the point. The fact of such a note, and everything except, possibly, the precise amount thereof, is established by the testimony of McDonald and McKay, and the existence and payment of the note are admitted and shown by the testimony of Mrs. Monroe herself. I say everything concerning this note and concerning its payment is established by testimony other than Mr. Moore's, and his testimony in regard to it, including the amount of the note, is so supported bythe other testimony that if the amount were material his testimony on that point ought, in the absence of any contradiction or attempt to contradict it by facts, to be received. But, in view of the rescission and utter abandonment of this contract, the exact amount of that note is, we insist, immaterial.

On the 16th of December, 1880, McDONALD AND McKAY CONVEYED AN UNDIVIDED ONE-THIRD of THIS LAND TO THE DEFENDANT HELEN MOORE, by deed absolute on its face (*Record, p. 78*), and their wives subsequently released dower; and by subsequent conveyance, as above stated, after McDonald had acquired the tax title of Ayer, he conveyed such title to Mrs. Moore. All these facts appear in the abstract of title (p. 78) and are undisputed. Mrs. Moore gave no independent consideration to McDonald and McKay for the deed of December 16, 1880, to her, except the nominal sum of two dollars. It was made to her under the circumstances hereinafter stated and discussed.

THIS BILL WAS FILED IN FEBRUARY, 1882. At the date of the conveyance to Mrs. Moore in 1880, it is established that the land was not considered worth any more than it had been in 1875. It is shown both by McDonald and McKay that McDonald offered to sell a

third interest in the same quarter section in the year 1880 for $500 (*Record, pp. 24 and 30*). These disinterested witnesses say that up to May, 1881, there had been no change in the value of this land (*Record, pp. 24, 31 and 32*). There is no opposing testimony on this point. The explorations by the Cambria Company for minerals began in 1881 (*Record, pp. 24, 31, 32*), and the indications were such that soon afterwards the land began to enhance in value, and that this land was of great value was known by or about March or April, 1882 (*Record, pp. 24, 32*).

IT WAS AT THIS JUNCTURE, to wit, in February, 1882, that the present bill was filed, setting up an abandoned and antiquated claim of an interest in this land. The Court entered a decree for the complainants (*Record, p. 142*), supporting it by an Opinion, which will be found in the Record at pages 134–142. The defendants appeal.

Assignment of Errors.

The appellants assign as error:

FIRST. That on the proofs the decree ought to have been one dismissing the bill, and not a decree in favor of the complainants.

SECOND. The bill stated no case for relief, and the case stated was not proved.

THIRD. The complainants established no equity to a decree against the defendant Helen Moore for an undivided one-sixth interest in this land, or any other interest.

FOURTH. Complainants' whole case rested on the deed from Moore to Monroe dated October 18th, 1875, which not only gave no right to the relief sought, but negatived such right; nor did the proofs *aliunde* the

deed establish any right to the relief which was sought or granted.

FIFTH. The Court ought to have found that the several deeds from McDonald and McKay to Mrs. Moore conveyed to her an absolute title to the land in question, free from any trust or equity whatever in favor of the complainants, and that the complainants had no equity to divest the defendants' legal title.

SIXTH. The Court ought to have found and decreed that the deed and contract of sale between Moore and Monroe, on which the complainant's rights rested, had been rescinded and abandoned, and that the complainants had no right to any equitable relief in respect thereto.

SEVENTH. The Court ought to have excluded all the oral testimony relating to the alleged trust, because contrary to the Statute of Frauds and the rules of law.

EIGHTH. In treating the deed by Moore to Monroe as a contract to convey; and further, in decreeing a conveyance by Mrs. Moore on the ground of the deed and covenants to which *Mrs. Moore* was not a party or privy.

NINTH. In finding that McDonald and McKay "waived" the Statute of Frauds, and "waived" also defects in the alleged agreement between them and Moore. Also in finding that the Statute of Frauds *could* be "waived," or that the defects *could* be remedied, except by a sufficiently definite agreement in writing, or by an actual execution of a conveyance to Moore. Also, in admitting parol evidence for various purposes for which it was admitted.

TENTH. In finding that there *was* any fraud cognizable at law or in equity, or any fraud whatever.

ELEVENTH. In treating the conveyance from McDonald and McKay to Mrs. Moore *as if* the land had first been conveyed to Moore, and then by him to Mrs. Moore, thus *disregarding the facts as proved*, and introducing a conveyance where none existed.

TWELFTH. In holding that Mrs. Moore was a trustee by operation of law, or by reason of the alleged "fraud."

THIRTEENTH. In failing to find that Mrs. Moore held a title to the land in question free from any equity, because she had received an absolute conveyance from McDonald and McKay, who held a title free from any equity, and because it was not shown that McDonald and McKay were induced by fraud to make such conveyance, nor that it was the result of accident or mistake.

FOURTEENTH. In rejecting Moore's testimony.

FIFTEENTH. In not finding that the plaintiffs had no equity to have any alleged contract specifically enforced by reason of :

(*a*) The rescission of the contract.

(*b*) The abandonment of the contract.

(*c*) The delay of Monroe and his heirs to seek performance *until*,

(*d*) The land had greatly enhanced in value, *and until*

(*e*) Moore could not have enforced performance against them, if the land had decreased in value.

(*f*) The total failure to perform on the part of Monroe or his representatives.

ARGUMENT.

I.

The case made by the bill and amended bill was not proved, and the same ought to have been dismissed. No case was stated in the bill and amended bill which authorized the inquiries made by the Court below or which justified the decree.

Case stated in the Bill. THIS BILL (Record, p. 2, fol. 3) was filed in February, 1882. The complainants, after averring that they are the heirs at law of John Monroe, alleged: (1) That on October 19, 1875, one of the defendants, Nat. D. Moore, *in consideration of* $250 *paid to him* by said John Monroe, made a warranty deed of the land in suit to said John Monroe. That said deed was duly recorded. (2) That on or about January 26, 1875, James H. McDonald and John McKay became the owners in fee simple of the land in suit, but *held it in trust* for said Nat. D. Moore. (3) That in order to carry out said trust said McDonald and McKay, some

time between January, 1875, and March, 1881, *made a deed of said land to Moore.* (4) That said deed to Moore has been destroyed or suppressed. (5) That on or about December 16, 1880, "for the purpose of cutting out complainants' title" to the land in suit, said McDonald and McKay, at the request of Moore, conveyed the said land to Helen Moore.

The prayer of the bill then is, that the said Helen Moore be compelled by decree to execute a conveyance to the complainants.

THE ANSWER of the defendants (Record, p. 4, fol. 8), Nat. D. Moore and Helen Moore, admits that complainants are the heirs at law of said John Monroe. (1) Admits that said Nat. D. Moore made a deed to said Monroe, but *denies that the consideration of $250 was ever paid;* and further says that said Moore himself had no title at the time. (2) Admits that said McDonald and McKay became the owners in fee simple of said land, but *denies that they held it in trust for Moore.* (3) and (4) *Denies the making and delivery of the deed alleged to have been made by said McDonald and McKay to said Moore.* (5) Admits that said McDonald and McKay conveyed the said land to said Helen Moore.

The answer further sets up as a defense that the sale by Moore to Monroe was *rescinded and abandoned, and that the note for $240, and the $10 in money, which constituted the only consideration for the deed were recovered back.* That, since the making of said sale, and since said rescission and abandonment, and recovery back of the consideration, and before complainants had made any claim to have any interest in the said land, *the said land had greatly enhanced in value.*

On the bill and answer the proofs were all taken.

The complainants failed to prove the material allegations in their bill, namely, *that the consideration of $250 was ever paid; that McDonald and McKay held the land in trust for Moore;* that McDonald and McKay *made and delivered the alleged deed or any deed to Moore,* and that any deed *had been destroyed or suppressed.* The failure of the proofs on each of these points is absolute.

Complainants having thus utterly failed to prove the case made by their bill or indeed any case for relief, more than four years after said bill was filed, and after the proofs were all taken, amended their bill (Record, p. 9, fol. 19) by charging that the conveyance by McDonald and McKay to Helen Moore was made

> " At the instigation of said Nat. D. Moore with the intent and purpose of *defrauding* these complainants out of the estate in fee conveyed and assured and intended to be conveyed and assured to the said John Monroe by the said Nat. D. Moore, &c., &c."

This amendment did not change the case made by the original bill. All of the averments of the original bill were left standing, and in that it was charged that the conveyance by McDonald and McKay to Mrs. Moore was made for the purpose of " cutting out " complainants' title, which rested upon the alleged lost and suppressed deed to Moore (*Record, p. 3, fol. 6*). The amended bill leaves all of the allegations of the original bill untouched, and then charges that the conveyance from McDonald and McKay to Mrs. Moore was made with the intent *to defraud* the complainants out of the estate conveyed, or intended to be, by the deed from Moore to Monroe, &c. The complainants' title in and by the bill and amended bill rests alone

upon the allegations: *first*, that McDonald and McKay held this title in trust for Nat. D. Moore (which is not true); *second*, that McDonald and McKay made a deed thereof to Moore (confessedly not true); *third*, that this deed had been suppressed or destroyed (confessedly not true); *fourth*, that the deed to Mrs. Moore was made at the instigation of her husband, with a view to "cut out" the title of the complainants, *thus as aforesaid acquired*, or defraud them of it.

The defendants insist that, on the admitted or undisputed facts, the case stated in the bill for relief was not only not established, but disproved, and the bill ought, accordingly, to have been dismissed. The case made by the bill was that McDonald and McKay had conveyed the land in question to Nathanial D. Moore by a deed which had been lost or suppressed, thereby vesting him with the title, which enured to the benefit of the complainants; and that by fraud this deed had been destroyed or suppressed, and the deed from McDonald and McKay to Mrs. Moore was made to cut out the complainants of their title *thus acquired*, or to defraud them of it. On the proofs it was clearly established that no such deed as the bill alleges from McDonald and McKay to Moore was ever executed or delivered. Hence it was never lost or suppressed by Moore, as is charged; hence the deed from Moore to Monroe never became operative or conveyed any title to Monroe; and hence the complainants never had any title, such as was alleged in the bill, out of which it was possible to defraud them. The defendants insist that the total failure to prove the averment that McDonald and McKay held in trust for Moore, and that they conveyed the legal title to Moore, necessarily involved a dismis-

sal of the bill, as this was the fundamental basis of the case stated in the bill, and that aside from this there were no sufficient averments to afford any ground for equitable relief. Thus, there were no allegations in the bill which would warrant the Court to treat the deed from Moore to Monroe as an executory contract and then specifically to enforce it, much less to enforce any such supposed contract against *Mrs.* Moore, who was not a party to that deed. There were no allegations in the bill (nor was the bill framed upon the theory), that the effect of the deed from McDonald and McKay to Mrs. Moore was to create a constructive trust in this land in favor of Monroe, of which the complainants were defrauded by the deed from McDonald and McKay to Mrs. Moore.

If I am mistaken in this view of the pleadings, I proceed to show upon various grounds that the decree below cannot be sustained, supposing the bill to be as broad or elastic as the complainants claim it to be.

II.

McDonald and McKay held the absolute title to the land in question, free from any equity, that is, free from any equitable title, or even equitable right, in favor of Moore.

THIS PROPOSITION is so fundamental, and, as I regard it, so decisive of this cause against the complainants

that I deem myself justified in attempting to establish it so firmly as to place it beyond any fair question. Having done so, I shall notice the attempt to evade its force and then point out its necessary consequences.

1. McDonald and McKay obtained an absolute title from the State, unaffected with any trust.

The land was purchased from the State of Michigan with the money of McDonald, or McKay, or both (*Record, fols. 27, 28, p. 15 ; fol. 44, p. 25 ; fol. 50, p. 29 ; fol. 59, p. 36*) ; and the title taken in their names (*Record, fol. 27, p. 15 ; 78, 79, fol. 118 a, Abstract of Title, Conveyance No. 1*).

The statement by W. D. McIntyre (*Record, fol. 91, p. 56 ; fol. 94, p. 59*) that he furnished the money or part of it, if true, must be understood in the sense that he *loaned* to McDonald and McKay, or to the latter, whatever money he furnished ; and from the testimony of McKay (fol. 46, p. 27) it seems that McIntyre loaned McKay the latter's part of the money to make the purchase, while from the testimony of McDonald (*Record, fol. 28, p. 15*) it seems also that McKay did not pay his part at the time of the purchase from the State, but afterwards. However, no trust in the land in favor of McIntyre would have arisen from such a loan (*Aveling vs. Knipe*, 19 Ves., 441 ; *Bartlett vs. Pickersgill*, 1 Eden, 515 (*semble*) ; *Smith vs. Garth*, 32 Ala., 368 ; *McCue vs. Gallagher*, 23 Cal., 51 ; *Loomis vs. Loomis*, 28 Ill., 454 ; *Hubble vs. Alston*, 31 Ind., 249 ; *Jackson vs. Stevens*, 108 Mass., 94 ; *Gibson vs. Foote*, 40 Miss., 788 ; *Botsford vs. Burr*, 2 Johns. Ch., 405).

The special Statute of Trusts of Michigan, moreover,

prevents any resulting trust from the payment of the consideration (§ 5569, *How. Stat.* *). And such was the opinion of the Court below (*Record, p. 137*).

Furthermore, it is not set forth in the bill or otherwise claimed as part of the plaintiff's case that any trust resulted from the patent by the State to McDonald and McKay.

2. NO EQUITY AROSE FROM THE ALLEGED VERBAL UNUNDERSTANDING BETWEEN MCDONALD AND MCKAY ON THE ONE SIDE AND MOORE ON THE OTHER.

The evidence in regard to the alleged understanding established two facts: (1) There was no writing to satisfy the Statute of Frauds; (2) There was not even an oral agreement such as equity would enforce, irrespective of any question of the Statute of Frauds.

And such on both of these points was the opinion and conclusion of the Court below, which said:

"The arrangement was *altogether oral.* One witness testifies that it was reduced to writing and signed, but that is denied by the parties to it, and his testimony does not contain any definite statement of the contents of the writing. *The arrangement was so loose and indefinite in its terms that, aside from any objection resting upon the Statute of Frauds, it would not have warranted*

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* The Statute of Michigan is as follows:

"When a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named, as the alienee in such conveyance, subject only to the provisions of the next section."

How. Stat., § 5569.

The next section merely provides that "such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration."

a decree for specific performance. Whether Moore was to have one-third or one-fourth interest in the lands does not clearly appear. There seems to have been nothing more than a mutual understanding that McDonald and McKay would do 'what was right'; having reference to a recognized custom to give 'explorers' one-fourth, one-third, or, in some cases, one-half interest in the lands located by them."

Per SAGE, J. (Record, fol. 211, p. 134); S. C., 28 Federal Reporter, p. 825.

THIS CONCLUSION OF THE COURT is not only supported by the evidence, but any other conclusion would be against the evidence.

There was no written agreement or memorandum in writing, nor was there any oral agreement, but merely an expectation or an indefinite and undefined "understanding" based on a custom to give "explorers" an interest in discovered mining land.

That there was such an expectation or "understanding" was admitted by all the witnesses who testified in regard to the alleged agreement. But this understanding, even, was loose and indefinite, and not in writing.

JAMES H. MCDONALD (who plaintiffs claim, and who W. D. McIntyre states, was one of the parties to an alleged writing) testified (Record, fol. 24, page 12):

"Well, I can tell the whole circumstances. *When he* (i. e., *Moore*) *went out I told him if he could see anything that would make his eye water to let me know.* I don't know as I ever spoke to him about an interest, but it was always understood, you know, when a man looked up minutes that he should have an interest in it. So when he came back he told me to enter such and such land. I don't remember as I said anything about any interest or anything about it, but it was always understood."

This statement was repeated by witness, who also

gave other testimony to the same effect (*Record, pages 14, 15, 16.* The same witness testified that he did not have any written agreement with Moore (*Record, fol. 53, page 31*).

JOHN MCKAY, who, it is stated by W. D. McIntyre, was also a party to the alleged writing, testified (*Record, fol. 44, page 25*) :

"I understood that Moore was to have an interest, as all explorers get an interest generally." * * * "I don't think we gave Moore any memorandum about it, then or at any time. I don't remember us giving him any writing for it."

He stated also that he did not recollect any new understanding or agreement with Moore relating to the land between the times of making the Viele deed (the deed which was intended to be made by McDonald and McKay to Moore, but which was never fully executed or delivered, and was left with Viele) and the first understanding mentioned (*Record, fol. 45, page 26*).

NATHANIEL D. MOORE, one of the defendants, and another alleged party to the alleged writing, testified (*Record, fol. 59, page 36*) :

"I did not have any contract in writing with them or either of them that I should have an interest in the land." He "expected" an interest, however. Again, he testified (*Record, fols. 160, 161 ; p. 109*) : "I have no such contract, and I never had one."

THUS, NOT ONE OF ALL THE ALLEGED PARTIES TO THE SUPPOSED WRITING recollected or admitted the existence of any such paper. The only witness who testified to it was W. D. MCINTYRE, *a brother of one of the plaintiffs, Mrs. Crawford.* His testimony was contradictory and utterly unreliable ; and even if it were worthy of

belief, it stated a writing which was so indefinite in terms and parties that no court would specifically enforce it as a contract (*see on this point the opinion of the Court and the testimony, supra*).

McIntyre testified (*Record, fol. 91, p. 57*): That there was an agreement drawn up between Moore, McDonald and McKay; that he saw the agreement; that he read it; and that Moore wrote it. Later he testified *Record, page 86*) that he did *not* see the agreement.

When questioned as to the substance of the agreement, he replied:

"I can't remember the words of the agreement." He was then asked to state his recollection of what the agreement was. In reply he could state only, "That Moore was to have a third interest in the property." Counsel for plaintiffs then proceeded further in an attempt to extract from witness statements one by one apparently intended to patch up the essentials of a contract. The questions and answers after the statement, "That Moore was to have one-third interest," were not confined to the alleged writing, but may have referred to the oral understanding, and they state nothing more than was common talk with reference to that "understanding." Thus, counsel inquired: "What was the consideration of his getting his one-third interest?" and McIntyre, of course, replied: "For his exploring and finding the property." Another question and answer were as follows:

"Who was to go and enter the lands?"

Ans. "Moore."

But when counsel inquired "who signed the agreement," McIntyre answered "J. H. McDonald and McKay." *He could not tell whether Moore, who he alleged was a party to the agreement, signed it or not.*

When McIntyre was asked what was done with the paper, his answers presented a curious series of contradictions: *First*, "McDonald held the paper, *as far as I can learn*" (the last part of this answer seems to indicate that McIntyre derived his knowledge in regard to the agreement from some one besides himself, at or about the time of the giving of his testimony).

Second, "I think McDonald held the paper after it was signed, but I couldn't be certain whether it was Moore or McDonald: I know McKay didn't get it" (Record, *fol.* 92, *p.* 57).

Third, "*Moore didn't keep it*" (*Record, fol.* 96, *p.* 60).

Fourth, "I could not tell which of the three parties kept it" (*Record*, fol. 96, p. 60).

Fifth, in answer to the question "are you sure they didn't hand it to somebody else to keep for them," he he replid "*Not while I was there.* I know the paper was drew up and signed" (*Record, fol.* 96, *p.* 60). He then admitted that "*he went away leaving McDonald and Moore there at the time*" (*Record, fol.* 96, *p.* 60).

Sixth. "I don't know which of them took the paper, but Moore's interest was mentioned in the agreement" (*Record, fol.* 96, *p.* 60).

Seventh, in correction of testimony he stated (*Record, fol.* 96, *p.* 60): "*Moore held the paper*," and he "must have misunderstood the question at the time." In view of the repeated questions and answers this last statement that he "must have misunderstood" is preposterous. The answers were not "yes" and "no," but McIntyre himself used the names in his answers. His conclusion that "Moore held the paper" probably arrived at four days after his testimony was given (*Record, p.* 88), and after consultation with parties in interest, in the absence of defendants counsel (p. 88), seems aimed at meeting the absurdity established by some of his former answers, that so far as he knew, only McDonald and McKay signed the writing, and the writing was not kept by Moore.

Thus, after all his contradictions, and after his admission that he "*went away leaving Moore and McDonald there at the time*," he finally concluded by stating what, according to his own testimony, he could not possibly have known that "Moore held the paper."

IT IS SUBMITTED, that even if there were no other testimony as to the alleged writing, the self-contradiction and evident fictitiousness of the testimony of McIntyre himself not only renders his testimony insufficient to establish such a written agreement as plaintiffs

allege, but further shows that McIntyre is an utterly unreliable and unfaithworthy witness in any matter connected with this suit.

He states that three men (McDonald, McKay and Moore) made an agreement in writing. All of them on oath deny the making of any such agreement. Two of them are disinterested and impartial witnesses, while McIntyre, as a brother of Mrs. Crawford, is naturally interested in her favor.

THAT THE ORAL UNDERSTANDING WAS, AS FOUND AND HELD BY THE COURT BELOW, TOO INDEFINITE TO AMOUNT TO AN AGREEMENT ENFORCEABLE IN EQUITY, is evident from the testimony quoted *supra*, and from other testimony too lengthy to quote upon this brief (*see the opinion of* SAGE, J., *referred to supra, in regard to this point*).

A. NO TRUST AROSE OUT OF THE ORAL UNDERSTANDING.

It is true that in equity the vendor of land is, for many purposes, treated as a trustee for the purchaser (*Sugden on Vendors and Purchasers, 191*). But in order that a trust may arise out of the relation of vendor and purchaser, there *must be a valid contract, enforceable in equity*. If equity cannot decree specific performance, no trust arises. This is a necessary consequence and is stated or implied in the language of all the authorities :

" In the view of courts of law, contracts respecting lands, or other things, *of which a specific execution will be decreed in equity*, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But courts of equity regard them in a very different light. They treat them, for most purposes,

precisely as if they had been specifically executed. Thus, if a man has entered into a *valid contract* for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money."

Story Eq. Juris., § 790.

See also

Sugden on Vendors and Purchasers, ubi supra.

Dart on Vendors and Purchasers, 114.

This is upon the principle that equity, wherever justice requires it, looks upon that as done which a person has by a valid and binding contract agreed to do. Courts of equity do not interpret or apply this maxim in the loose way in which it is sometimes stated. They never enforce a mere moral obligation; neither do they enforce an obligation where any express statute or rule of common law or of evidence stands in the way. And like all general maxims, which are never of universal application, this maxim is ever applied by chancellors with discrimination and caution and only where good conscience and the ends of justice require it.

Mr. Justice STORY, speaking of this subject, says:

"The true meaning of this maxim is, that equity will treat the subject matter, AS TO COLLATERAL CONSEQUENCES AND INCIDENTS, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them. *But equity will not thus consider things in favor of all persons*, BUT ONLY IN FAVOR OF SUCH AS HAVE A RIGHT TO PRAY THAT THE ACTS MIGHT BE DONE. * * * The most common cases of the application of the rule are under agreements. All agreements are considered as performed which are made for a valuable consideration, *in favor of persons* ENTITLED TO INSIST UPON THEIR PERFORMANCE. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed," &c.

Story Eq. Juris., § 64g.

See also *Ibid.*, § 1212.

B. THE ORAL EVIDENCE WAS WHOLLY INADMISSIBLE AND THE ALLEGED ORAL UNDERSTANDING IS WITHOUT ANY LEGAL PROOF.

THE ORAL EVIDENCE *by which it was attempted to establish the alleged agreement between McDonald and McKay on one side and Moore on the other, was duly objected to, and improperly admitted, because such evidence was entirely oral, and therefore inadmissible under the Statute of Frauds.*

This objection excludes from judicial consideration all the evidence by which it was sought to prove such agreement, and, therefore, there *was no such agreement which the Court could recognize for any purpose.* Courts of equity, as well as courts of law, are bound by this rule.

It is the rule beyond all question that the Statute of Frauds requires that all agreements for an interest in lands be *proved by some writing.* Such is the very object of the statute. The rule and its general application are too well known to require a citation of authorities.

THE STATUTE OF FRAUDS IS IN FORCE IN MICHIGAN, and is interpreted there, as elsewhere, to require that all agreements for an interest in lands be *proved by some writing.* The Michigan Statute is as follows:

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, assigning or declaring the same,

or by some person thereunto by him lawfully authorized by writing."

§ 6179, *How. Stat.*

On the construction of this statute, see

Trask vs. Green, 9 Mich., 358, 366.
Groesbeck vs. Seeley, 13 Mich., 345.
Newton vs. Sly, 15 Mich., 396.
Whiting vs. Butler, 29 Mich., 144.
Brown vs. Bronson, 35 Mich., 415.
Palmer vs. Sterling, 41 Mich., 220.
Shafter vs. Huntington, 53 Mich., 310.

The elementary principles of the law to the effect that oral evidence cannot be received as a substitute for written evidence are well known, and, perhaps, need hardly to be referred to:

"Consistently with the principles already adverted to, it is a general rule that oral evidence shall in no case be received as *equivalent* to, or as a substitute for, a written instrument, where the latter is required by law."

"To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive weight and authority is given by the solemn compact of the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose recollection, and uncertainty of memory, for the most sure and faithful memorials which human ingenuity can devise, or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memory of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices. In short, the great advantages which are peculiar to written evidence would be, in a great measure, if not entirely, sacrificed."

Starkie on Evidence, 753, 754, 755.

See also

Greenleaf on Evidence, § 262, *et seq.*

The purpose and policy of the Statute of Frauds and the Course of Equity in regard thereto, are clearly expounded by Mr. Justice STORY:

"THE OBJECTS of this statute (the Statute of Frauds), are such, as the very title indicates, to prevent the fraudulent setting up of pretended agreements, and then supporting them by perjury. But, besides these direct objects, there is a *manifest policy* in requiring all contracts of an important nature to be reduced to writing, since otherwise, from the imperfection of memory, and the honest mistakes of witnesses, it must often happen, either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its precise original terms. *So sensible were Courts of Equity of these mischiefs, that they constantly refused* BEFORE THE STATUTE, *to decree a specific performance of parol contracts unless confessed by the party in his answer, or they are in part performed.*"

Story Eq. Juris., § 753.

So again, this learned author says:

"It is obvious that *courts of equity are bound, as much as courts of law, by the provisions of this statute;* and, therefore, they are not at liberty to disregard them. That they do, however, interfere in some cases within the reach of the statute, is equally certain. But they do so, *not upon any notion of any right to dispense with it*, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent of it."

Story Eq. Juris., § 754.

THERE IS A WIDE AND WELL UNDERSTOOD DIFFERENCE between the admission of parol evidence to prove the *existence* of the contract on the one hand, and evidence to *impeach its validity* on the other. The Statute of Frauds forbids its admission for the former purpose, but not for the latter. It is sometimes erroneously stated that courts of equity can disregard the Statute of Frauds. Not so. Equity does not have, and does not profess to

have, any power to disregard a statute. To assume such power would be intolerable judicial legislation. It is true that courts of equity have frequently said that the Statute of Frauds should not be made a cover for fraud. But in the application of this maxim, they have not disregarded the statute. They have admitted parol evidence, not for the purpose of proving the *existence* of the contract, which is what the statute forbids, but only for the purpose of *interpreting* it *after* its existence has been *proved by writing;* or for the purpose of proving some *collateral fact* which will impeach the *validity* of the contract *after* it is proved by writing, the most common cases of which, if not the only cases, are fraud, accident or mistake in making the contract.

THE DOCTRINE OF EQUITY is thus stated by CHANCELLOR KENT in one of his learned judgments :

"There is no rule of evidence better settled than that which declares that parol evidence is inadmissible to contradict, or substantially vary, the legal import of a written agreement. Such testimony is not only contrary to the Statute of Frauds, but to the maxims of the common law ; and *the rules of evidence on this as on most other points, are the same in courts of law and of equity* (citing authorities). The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is as well grounded in reason and policy as it is in authority. Nor does this case come within any exception admitted here to the operation of the rule ; for there is no allegation of *fraud, mistake, or surprise in making or executing the mortgage ;* and those, I believe, are the only cases in which parol evidence is admissible in this Court against a contract in writing. (*Marquis of Townsend vs. Stangroom*, 6 Ves., 328 ; *Rich vs. Jackson, Ib.*, n.)

"There is another rule which has some connection with this branch of the law of evidence, and which will, in certain cases, and on certain terms, admit an agree-

ment in writing concerning lands to be *discharged by parol.* But the evidence in such cases is good only as a *defense* to a bill for a specific performance, and is *totally inadmissible, at law or equity, as a ground to compel a performance in specie.*"

Stephens vs. Cooper, 1 Johns. Ch., 425, 429.

Such is also the rule of the English courts:

"In the absence of fraud the authorities are distinct and decisive that no new parol agreement can be substituted. It is clear that, at law, such an agreement as this, namely, to pay the debt of another person, cannot be made and cannot be waived by parol; *and, in this Court, unless there be fraud, the same rule prevails;* and there is not here even a suggestion of fraud. It is, therefore, immaterial whether any, and if any, what parol agreement was entered into?"

" * * * The agreement, if any, must be proved; it cannot be proved by parol evidence, and the case affords no other; it cannot, therefore, be proved at all."

Emmet vs. Dewhurst, 2 McN. & Gordon, 587, 597.

(C) THERE WAS NOTHING TO RENDER THE ORAL UNDERSTANDING ENFORCEABLE, NO POSSESSION UNDER IT, NO FRAUD, NO PART PERFORMANCE OR THE LIKE TO TAKE THE CASE OUT OF THE STATUTE OF FRAUDS.

In the absence of written evidence a contract respecting lands, within the Statute of Frauds, which satisfies other requirements so that it would be enforceable if there was a writing, can be specifically enforced only on three grounds, which, while at the first glance they might seem to be exceptions to the general rule, really are not exceptions at all. The first two apparent exceptions fall within the rule that a court of equity has jurisdiction to remedy *fraud*, and in the exercise of

that jurisdiction allows fraud to be proved by parol. It is not a valid objection to parol evidence in such a case, that it *incidentally* proves the contract also; nor, further, that *in order to remedy the fraud* equity enforces the contract so proved. But equity never enforces a parol contract where the only ground on which fraud is alleged is the non-performance of the parol contract (*vide infra*). The third apparent exception is really the case of a compliance with the Statute of Frauds by a writing signed by the party to be charged.

THESE APPARENT EXCEPTIONS are stated and commented on in *Dart on Vendors and Purchasers*, 476 *et seq.*:

"Although in general there must, in order to sustain a suit for specific performance, be a contract in writing within the Statute of Frauds, the Courts in certain cases decree specific performance of a parol agreement, upon the ground: 1st, of fraud having been the cause of the non-compliance with the requisitions of the statute; 2dly, of the parol agreement having been in part performed; or 3dly, of its existence having been admitted by the defendant."

"1st. If *by fraud* the defendant has prevented a compliance with the requisitions of the statute, this will not avail him, but the plaintiff will be entitled to relief on proving the fraud and the parol contract."

For this proposition the learned author cites *note to Pym vs. Blackburn*, 3 Ves., 38; and a later editor adds a further note giving illustrations of the application of the rule, and referring further to *2 Story's Eq. Juris.*, § 768. See also *Story Eq. Juris.*, § 330.

It is unnecessary to state that this rule has no application to the present case, for there is not the slightest evidence or even pretence of any fraud in any of the transactions between McDonald and McKay on the one hand and Moore on the other, by means of

which a compliance with the Statute of Frauds was prevented in regard to the understanding with Moore.

"2dly. As to acts of part performance sufficient to take a case out of the Statute of Frauds. It is in general of the essence of such an act that the Court shall, by reason of the act itself, *without knowing whether there was an agreement or not*, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract."

THE REASON for the rule and its limitations are well stated by Mr. JUSTICE STORY:

"But a more general ground, and that which ought to be the governing rule in cases of this sort, is, that *nothing is to be considered as a part performance which does not put the party into a situation which is a* FRAUD *upon him, unless the agreement is fully performed.* Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose there seems no reason why it should not be admissible throughout. A case still more cogent might be put, where a vendee, upon a parol agreement for a sale of land should proceed to build a house on the land, in the confidence of a due completion of the contract. In such a case there would be a manifest fraud upon the party in permitting the vendor to escape from a due and strict fulfillment of such agreement. *Such a case is certainly distinguishable from that of part payment of the purchase money, for the latter may be repaid, and the parties are then just where they were before*, especially if the money is repaid with interest. A man who has parted with his money is not in the situation of a man against whom an action may be brought, and who may otherwise suffer an irreparable injury."

Story Eq. Juris., § 761.

MR. WATERMAN, after quoting from the above section, says:

"The part performance which will accomplish that result *must be not merely of that nature which may be said to exist in every case of a refusal to fulfill an agreement after having received the consideration, but which consists in placing the other party in a situation to be held liable as a wrongdoer, or in some other way of being made the victim of a* FRAUD, or of an injury in the nature of a fraud, on account of acts done in part execution of the agreement, unless protected by its complete fulfillment."

Waterman on Specific Performance, § 269.

"THE PAYMENT OF THE CONSIDERATION, EITHER IN MONEY OR SERVICES, IS NOT SUCH A PART PERFORMANCE AS TO TAKE THE CASE OUT OF THE STATUTE OF FRAUDS.

It is the settled doctrine of this Court *that the mere payment of the consideration, unaccompanied by any other act, is not such a part performance of a parol contract for the conveyance of land as will authorize a court of equity to specifically enforce contracts of that character.* There must be some other act done to raise an equity in favor of a party to a complete performance, such as the taking of possession of the lands sold under the contract by the purchaser; or, one party must have induced the other so to act that if the contract be abandoned he *cannot be restored to his former position*, and a refusal to perform the contract will operate as a fraud."

Horn vs. Ludington, 32 Wis., 73, 76.

See also,

Johnston vs. Glancy, 4 Blackf. (Ind.), 94.
Sugden on Vendors and Purchasers, 142 *et seq.*
Story Eq. Juris., § 760.

So in this Court:

Purcell vs. Miner, 4 Wall., 513.
Williams vs. Morris, 95 U. S., 444.

In the present case Moore did not render services in pursuance of any request of McDonald or McKay,

or under any oral contract with them. He made the explorations on his own account, and the only conversation which he had with either of them was that McDonald told him just before he started out into the woods : " if he could see anything that would make his eye water to let me know " (Record, p. 12, fol. 24). But suppose that he had performed the services in pursuance of an oral contract, still such services do not constitute such part performance as to take the case out of the Statute of Frauds. Such services could be fully compensated in money damages in a court of law. Moore could have been put, not perhaps in the same situation in which he would have been if such supposed contract *had been performed—that* is not the test —but in the same situation in which he would have been, *if he had not performed the services.* He would have parted with his services. Their value could have been estimated and returned to him in pecuniary damages, which in legal contemplation would have been a full equivalent. Thus, he might have been made whole again as he was before.

" But we have no doubt, that in general, when a contract within the Statute of Frauds has been in part executed by one party, there is a *plain remedy* for such party, to a certain extent, in a court of law, if the other party fraudulently refuse to execute the contract on his part. If money has been paid, it may be recovered back. *If labor has been performed, a compensation for it may be recovered*" (*citing cases*).

Lane vs. Shackford, 5 N. H., 130, 133.

See also *Webster vs. Gray* and *Edwards vs. Estell*, quoted *infra*, pp. 35, 36.

THE LAW OF MICHIGAN IS CLEAR THAT MOORE HAD NO RIGHTS WHICH COULD BE ENFORCED IN EQUITY AGAINST MCDONALD AND MCKAY.

There are at least two adjudicated cases (one of which is by the Supreme Court of Michigan), that are decisive of the proposition that the services performed by Moore in exploring the land in question, even if they had been performed, as they were not, under a previous contract, did not constitute such part performance of the oral understanding with McDonald and McKay as to take that understanding out of the Statute of Frauds, and enable a court of equity specifically to enforce it as a contract. In *Webster vs. Gray*, (37 Mich., 37),

A parol contract was made, whereby one Webster was to select swamp lands and furnish descriptions of them to one Gray, who was to obtain the title to such lands from the State and convey one fourth interest in the lands so obtained to Webster.

The Court said :

"If such a contract could be specifically enforced at all, it can only be enforced when verbal, upon the ground that there has been such part performance by complainant that without complete enforcement he will be *defrauded beyond any reasonably adequate remedy.*"

"It has never been deemed proper to grant redress on a parol contract for a part performance capable of *full pecuniary measurement.* Generally there must have been a change of possession of the land in controversy, which is always regarded as involving considerations not easily estimated in damages. There are very few other cases where parties are placed in any such predicament as to require protection to save them from being defrauded."

"*All that Webster did or agreed to do was to perform certain exploring work which he had before done for compensation,* and *which could readily be estimated according*

to its actual value. A suit at law to recover compensation would produce ample redress. The employment placed him in no position from which he could not be extricated, and subjected him to no fraud or perils. He was merely working for pay, the pay being due in land instead of money."

"*This is not such a part performance as is required to take a case out of the statute.*"

Webster vs. Gray, 37 Mich., 37.

THIS EXPRESS DECISION OF THE SUPREME COURT OF MICHIGAN, ON THE PRECISE POINT under discussion makes it really superfluous to look further, but it is satisfactory to see that it accords with the judgment in the case next to be cited, and with the general doctrines of equity both here and in England. In a California case it appeared that,

A surveyor and another person entered into a parol contract by which the surveyor was to search for and survey swamp lands, and the other party was to pay the first twenty per cent. purchase money, and procure a certificate of purchase, and then deed one-half to the surveyor. *Held*, the services performed by the surveyor did not constitute such part performance as to take the case out of the Statute of Frauds so as to enable the Court to decree specific performance.

The Court said:

"There are two propositions upon which the cases are very fully agreed: first, that the payment of the purchase money will not be regarded as part performance; and second, that the acts of part performance must be such that it would be fraud upon him for the other party to refuse performance on his part. *The term purchase money, as employed in the proposition above stated, comprehends the consideration, whether it be money or property, or services for which the lands are to be conveyed, and is not limited to money alone.* Here the services to be performed by the plaintiff were the consideration for which the one-half of the lands were to be conveyed to him; and hence, the performance of those services did not constitute a sufficient part per-

formance within the meaning of the equitable rule. *There is no ground for saying that the plaintiff, by his alleged acts of part performance, has been placed in such a position that the refusal of the defendants to convey the one-half of the lands will operate as a fraud upon him.* The refusal to convey merely leaves him the creditor of the estate of Stewart, and *full compensation may be made for his services in money.* He is in no worse condition than if, instead of rendering the services, he had advanced their value in money.

Edwards vs. Estell, 48 California, 194.

THE THIRD APPARENT EXCEPTION is as follows:

"*3d.* Where the defendant, by his answer, admits the parol agreement as alleged in the bill, and does not claim the benefit of the statute, equity will decree specific performance."

Dart on Vendors and Purchasers, ubi supra.

The circumstances necessary for the operation of the rule expressed in this exception are that there is a suit brought for specific performance against one party to the contract, and that he has, in his answer to the bill, expressly admitted the contract, and has not claimed the benefit of the statute. As the answer to a bill in equity must be signed by the defendant, such admission constitutes a writing signed by the party to be charged.

See Sugden on Vendors and Purchasers, 134, *et seq.*

IN THE PRESENT CASE, at the time of the conveyance to Mrs. Moore, no suit had ever been brought by Moore to compel specific performance of the alleged indefinite understanding or contract to convey to him, nor had any writing been signed by McDonald and McKay. So this case does not fall within the third exception.

The argument that there was no trust attached to the land at the time of the conveyance to Mrs. Moore, because the Statute of Frauds rendered a parol contract unenforceable, even if there had been a parol contract and not a mere indefinite understanding, as there was in fact, might be rested here. But it is claimed by the complainants, and the Court below (Record, fols. 217, 218, p. 137) recognized the claim as valid, that the admission by McDonald and McKay of the oral understanding and of their willingness to convey to Moore, takes the case out of the Statute of Frauds.

(D) EVEN IF THERE WERE A PART PERFORMANCE, THE TERMS ARE NOT SUFFICIENTLY DEFINITE TO ENABLE A COURT TO ENFORCE THE CONTRACT.

Such, as we have seen, was the opinion of the Court below.

"In order to take the case of a verbal agreement to convey land out of the Statute of Frauds on the ground of part performance, two things are necessary. *The terms of the contract must be established by clear, definite and unequivocal evidence*, and the acts relied upon must be exclusively referable to the contract."

Bigelow on Fraud, Ed. of 1888, p. 447, and a long list of authorities there cited.

See also

Pomeroy Eq. Juris., § 1405.
Stanton vs. Miller, 58 N. Y., 192, 200.

Moreover,

(E) THE ADMISSIONS OF MCDONALD AND MCKAY, AFTER THE DEED TO MRS. MOORE, ARE WHOLLY INEFFECTUAL AND DO NOT WAIVE OR SATISFY THE STATUTE OF FRAUDS.

It seems necessary here to call attention to the exact proposition which we seek to establish, and which is the only one necessary to establish in this connection. It is this: that *at the time of the conveyance to Mrs. Moore*, McDonald and McKay held the title to the land in question free from any equitable title or equitable right in favor of Moore. In order to controvert this proposition, plaintiffs seek to show that the oral understanding between McDonald and McKay on one side and Moore on the other created an equity in favor of Moore. The only theory on which that understanding could create an equity is that the vendor is a trustee for the purchaser. But, as we have above shown, the vendor becomes such trustee only in case there is a *valid contract* which a court of equity can enforce specifically. Such a contract did not exist in the present case, because the understanding was entirely oral, and therefore not enforceable on account of the Statute of Frauds, unless it was within one of the exceptions mentioned *supra*, and we have seen that it is not. The single question in regard to the admissions of McDonald and McKay now is, whether, *at the time of the conveyance to Mrs. Moore*, such admissions had rendered the contract enforceable by Moore.

If McDonald and McKay, *up to the time of the conveyance to Mrs. Moore, and by that conveyance*, had done nothing to charge the land in equity, they could

not *afterwards* charge it. This fact disposes of all of the admissions made by McDonald and McKay in their *testimony* in the present case, because such testimony was given *after* the conveyance to Mrs. Moore. The question is therefore confined to the admissions made *before* the conveyance to Mrs. Moore.

There is no such thing as "waiver" of the Statute of Frauds, and the admissions had no effect whatever and are absolutely immaterial.

Whatever *oral* admissions McDonald and McKay may have made, the law cannot recognize them, because of the Statute of Frauds. *Their only binding act* in reference to the land was the conveyance to Mrs. Moore. That conveyance is the only thing which the law can recognize. To set up *oral* admissions of a willingness to convey to *one* party in opposition to an absolute and valid conveyance to *another* party is an absurdity unworthy of serious consideration.

THE POSITION OF THE PLAINTIFFS AND OF THE COURT BELOW AMOUNTS TO THIS: The understanding or alleged agreement was invalid and unenforceable because of the Statute of Frauds, and because it was indefinite, but McDonald and McKay subsequently made an oral admission of the understanding and of their willingness to make it definite and to comply with it, which oral admission rendered the oral understanding valid and binding. A complete answer is that the subsequent oral admission was as invalid as the first oral understanding, and added nothing to it, because the statute still remained unsatisfied. When an oral agreement is made the only way the statute can be satisfied is by a writing, which did not exist in the present case.

But such a writing is not a "*waiver*" of the statute; it is a *compliance* with it. Neither did the oral expression of a *willingness* to convey to Moore add anything to the oral understanding. The same willingness is always expressed in an oral contract, and an indefinite series of *oral contracts* cannot make one valid and binding contract where the statute requires a writing.

It was entirely competent for McDonald and McKay to change their minds as to their willingness to convey to Moore. They *did* so change their minds when they conveyed to *Mrs.* Moore. Whatever may have been their *spoken* words, their *written* words, the deed to Mrs. Moore, constitute the only expression of willingness to convey which the law can recognize. They could convey to whomsoever they pleased, *with* or *without* the consent of Moore. Hence, it is nothing that Moore consented to or even requested the conveyance to Mrs. Moore. It was in law, however it may have been in fact, wholly a voluntary matter on their part. Neither Moore's consent nor the lack of it could vitiate their conveyance. The land was, as we have shown, *theirs* absolutely; they could keep it, sell it or even give it away. This power of disposal follows as an incident of ownership. The contention of the plaintiffs that this power was restricted so that no conveyance could be made except to Moore is wholly unfounded in law or the facts of the case. Possibly not even the plaintiffs would openly contend that McDonald and McKay could not have conveyed to a stranger who was *not* the wife or a relative of Moore. But their case really involves that proposition, for the wife is a perfect stranger so far as ability to receive a conveyance to her separate use is concerned.

The only writing which the plaintiffs produce in evidence in reference to any conveyance by McDonald and McKay is the deed to Mrs. Moore. But that was not a compliance with the Statute of Frauds, *in respect to the oral understanding with Moore.* It was, on the contrary, a writing wholly inconsistent with that understanding. Upon no principle can it be contended that an absolute conveyance to *one* person is a compliance with the Statute of Frauds in respect to an oral understanding to convey to *another* person. Whatever expression of willingness to convey to Moore may have been made by McDonald and McKay, *their only binding act in reference to the land from beginning to end was the conveyance to Mrs. Moore.* As against Mrs. Moore such alleged "waiver" is *res inter alios acta*, and cannot prejudice her right to the land under the deed from McDonald and McKay. It is nothing to her, and it cannot affect her title, that before they conveyed to her they expressed a willingness to convey to *Mr.* Moore, for they were not legally *bound* to convey to him; and, therefore, no equity attached to the land.

It is settled law that an oral expression of a willingness to convey does not take the case out of the Statute of Frauds.

"No mere waiver of the parties can obviate the necessity of obeying the statute in such a case."

COOLEY, J., in *Beller vs. Robinson*, 50 Mich., 264, 266.

See also

Dean vs. Dean, 6 Conn., 285.
Ratliff vs. Ellis, 2 Iowa, 59.
Irwin vs. Ivers, 7 Ind., 308.

In view of the Statutes of Michigan (*ante*, pp. 19, 26); their construction (*ante*, p. 27 and *post*, p. 68); and especially the case of *Webster vs. Gray* (*ante*, p. 35) decided by the Supreme Court of Michigan, I fear this Court will regard much of the foregoing discussion as really unnecessary. But I wished to show that the decisions in Michigan were in full accord with the general principles of equity jurisprudence elsewhere.

I SUBMIT, with confidence, that I have shown, beyond any fair dispute, that down to and at the date of the conveyance by McDonald and McKay to Mrs. Moore (December 16, 1880) they held the absolute title to the land thus conveyed free from any equity, that is, free from any equitable title or right in Moore or Monroe, or any one else.

I NEXT PROCEED to show that Mrs. Moore, by virtue of the original conveyance to her by McDonald and McKay, took and holds a title as absolute as her grantors then held, and one free of any equity or trust in favor of Monroe.

Besides which she holds the subsequent conveyance for value of the Ayer tax title (*Record*, p. 78).

III.

No trust arose under the conveyance from McDonald and McKay to Mrs. Moore.

The deed from McDonald and McKay to Mrs. Moore was absolute on its face and required no consideration

to support it. By that deed the absolute legal and equitable title passed to Mrs. Moore; for McDonald and McKay held, as we have above shown (pp. 17–43), the title free from any equity, and conveyed to Mrs. Moore without raising any equity by the conveyance.

THESE PROPOSITIONS *are sufficient to dispose of the whole case:* (1) McDonald and McKay held the absolute legal and equitable title to the land, and they could convey both the legal and equitable title to whomsoever they chose. (2) They did convey, December 16, 1880, to Mrs. Moore by a deed sufficient both at law and in equity to vest in her the absolute legal and equitable title which they themselves held. (3) No fraud was practiced upon McDonald or McKay to induce them to convey, nor was the conveyance the result of accident or mistake.

The fact that Mrs. Moore was a volunteer, meaning thereby that she paid no consideration except the two dollars which were paid at the time of the deed to her (*Record, p. 34, fol. 57*), and that she also had notice of all the facts, make the case no different than it would have been if she had paid full value and had not had notice. The cases cited below illustrate the established principle that in the absence of fraud, accident, or mistake, *by which the grantor is induced to make the conveyance*, the title of the volunteer grantee is as secure both at law and in equity as that of a grantee who has paid full value. The *grantor* is the one who must have been defrauded, or who must have been affected by the accident or mistake. Creditors and persons who have equities in the land which they could have enforced while the title was in the grantor, can, of course, enforce their claims against the land in the

hands of any party except a purchaser for value without notice; but such a rule has no application to the present case. The title of the voluntary grantee is secure both against the grantor and against any third party who seeks to obtain the title because of an oral trust which could not have been enforced while the land was in the hands of the grantor; while in the present case there was not even an *oral* trust. The title is secure also even if without fraud practiced upon the grantors (McDonald and McKay) the grantee has taken the land upon an express oral trust in favor of a third person.

The fact that Mrs. Moore had notice makes the case no different, for there was no trust attached to the land of which notice could exist.

The power of disposal follows as an incident of the ownership of property, and the principle is firmly established that he who holds property free from any trust (as in this case McDonald and McKay), may alienate the property, by sale or by gift, and the alienee will likewise hold it free from any trust. The grantee stands in the shoes of the grantor and takes all of his rights without diminution or qualification. In accordance with this principle, it is well settled, that one who takes a title with notice from a purchaser for value without notice acquires the rights of the latter.

"It is a well settled rule of this Court, that a man who is a purchaser, with notice, himself, from a person who bought without notice, may protect himself under the first purchaser. The reason is to prevent a stagnation of property, and *because the first purchaser being entitled to hold and enjoy, must be equally entitled to sell.* (*Lowther vs. Carleton*, Cases Temp. Talbot, 187; 2 Atk., 139, 242; *Harrison vs. Forth*, Prec. in Ch., 51; *Brand-*

lyn vs. Ord, 1 Atk., 571; *Mertins vs. Jolliffe*, Amb., 313; *Smith vs. Southcote*, 2 Bro., 66)."

Per Chancellor KENT, in *Bumpus vs. Platner*, 1 Johns. Ch., 213, 219.

See *Peckham vs. Balch*, 49 Mich., 179;

and *Shafter vs. Huntington*, 53 Mich., 310, quoted *infra*.

(A) THE CONVEYANCE TO MRS. MOORE WAS VALID AS A GIFT, AND IS UNIMPEACHABLE.

The authorities are unanimous that, when the grantor, holding the title free from any equity, has made an absolute conveyance by a deed in the usual form, the grantee, in the absence of fraud, accident or mistake, in procuring such conveyance, holds an absolutely unimpeachable title. This is true though no consideration has been paid.

"This rule does not apply to modern conveyances, and no trust is now held to result to a grantor, although he conveys his estate without consideration."

1 *Perry on Trusts*, § 162, and cases there cited.

"A VOLUNTARY DEED *is valid between the parties as a gift*, and does not raise any trust in favor of the grantor. * * * It is otherwise with a feoffment, and perhaps in other conveyances whenever there is no declaration of the uses and the consideration is open to inquiry in determining the effect of the deed between the parties and their privies. * * * Supposing the deed in question to have been in the common form, the recital of a consideration and the declaration of the use to the grantee and her heirs in the *habendum*, are *both* conclusive between the parties, and exclude any resulting trust to the grantor."

Blodgett vs. Hildreth, 103 Mass., 484, 486.

Lloyd vs. Spillet, 2 Atk., 140.
Saunders on Uses, 5 Ed., p. 356.
Jackson vs. Cleveland, 15 Mich., 94.
Palmer vs. Sterling, 41 Mich., 218.
Dean vs. Dean, 6 Conn., 285.
Irwin vs. Ivers, 7 Ind., 308.
Ratliff vs. Ellis, 2 Iowa, 59.
Morrall vs. Waterson, 7 Kans., 199.
Philbrick vs. Delano, 29 Maine, 410.
Garry vs. Stimson, 60 Maine, 186.
Walker vs. Locke, 5 Cushing, 90.
Bartlett vs. Bartlett, 14 Gray, 277.
Titcomb vs. Morrill, 10 Allen, 15.
Gould vs. Lynde, 114 Mass., 366.
Graves vs. Graves, 29 N. H., 129.
Farrington vs. Barr, 36 N. H., 86.
Moore vs. Moore, 38 N. H., 382.
Hogan vs. Jacques, 4 C. E. Green, 123.
Jackson vs. Garnsey, 16 Johns., 189.
Sturtevant vs. Sturtevant, 20 N. Y., 39.
Wright vs. Gould, 2 Wis., 552.
Rasdall vs. Rasdall, 9 Wis., 379.

The case of *Bartlett vs. Bartlett, supra*, well illustrates the doctrine above stated and its application and legal effect. The identity of the legal status and position of the father in that case holding by a voluntary conveyance, and of Mrs. Moore in this case is obvious.

"A debtor conveyed an estate to his father, *without consideration*, and to prevent its being attached by creditors, and immediately afterwards, at the request of some of his father's other children, and with the knowledge, but without any consent of his father, agreed that the estate should be held in trust for one of the brothers who was a creditor of the grantor. HELD, that no trust was thereby created which could be enforced against the father, or against his heirs after his death."

CHIEF-JUSTICE SHAW gave the following opinion:

"Upon the case appearing in the report the Court are of opinion that the conveyance by William Bartlett to James Bartlett, Sen., his father, though made to delay creditors, was an absolute conveyance as between the parties, and it never having been contested by creditors, the estate remained vested in fee in the father at his death, and passed by descent to his heirs; *that from his never having made any declaration of trust in writing, and not having taken it originally on a resulting trust, no trust was affixed to the estate in his hands.*"

Bartlett vs. Bartlett, 14 Gray, 277.

That case is cited with approval in *Titcomb vs. Morrill.* The Court said:

"Regarding the bill, then, as setting forth a trust arising or resulting by implication of law, the plaintiff's position is that the *conveyance without consideration*, aided perhaps by a parol agreement, *raises a trust by implication of law* in favor of the grantor such as this Court can enforce. No authority is produced to sustain this position; and the case of *Bartlett vs. Bartlett*, 14 Gray, 278, is a recent authority to the contrary. It is unlike the cases referred to in Adams on Equity, cited by the plaintiff's counsel. The most numerous class of these cases is where a purchase is made in the name of one person and the purchase money is paid by another. None of these are cases where a grantor has been held to be *cestui que trust* on the ground that the consideration was not paid, or that there was a parol understanding that the grantee should hold the land in trust for him."

Titcomb vs. Morrill, 10 Allen, 15, 17.

The case of *Walker vs. Locke* well exemplifies by analogy the rights of the defendant Mrs. Moore under the deed to her. The Court says:

"Upon the facts stated in the bill, the question is whether the plaintiffs are in equity entitled to the relief prayed for. The bill states that the plaintiffs were induced by fraudulent representations of Locke, one of the defendants, to convey to him the real estate described in the bill for the purpose of raising money to pay off certain mortgages and attachments

thereon, and then to reconvey the estate to the plaintiffs. The only material allegation stated is that Locke informed the plaintiffs that 'the deed was a mere matter of form to enable him to obtain the money and pay off the attachments and mortgages, and that he would raise the money and pay the same, and then reconvey the estate to the plaintiffs.' "

" The manifest import of this allegation is that it was a mere matter of conversation, and not an agreement in writing. Nor is there any averment in the charging part of the bill from which it can be inferred that the defendant Locke ever agreed in writing to hold the estate in trust; but if there were any such averment it would not aid a defective averment in the stating part of the bill. The inference from the whole bill is that there was no agreement in writing or declaration of trust by Locke to hold the estate in trust, and any parol agreement or declaration to that effect is void by the Statute of Frauds."

Walker vs. Locke, 5 Cushing (Mass.), 90, 91.

The case of *Gould vs. Lynde*, illustrates the effect of the deed to Mrs. Moore.

Here A conveyed to B and B conveyed to C, A's wife, by deeds absolute on their face, and with a consideration recited, but not paid. A attempted to show that C held in trust for him. In a bill in equity to enforce the trust against C's heirs A alleged, among other things, " That for a period of more than five years the title remained in his wife; that during said time said estate was always treated by them as his property and not his wife's; that afterwards he made a request to his wife that she would fulfill her said trust and would reconvey the fee to him, and she undertook so to do, and supposed she had done so."

The Court said:

" It is conceded by the plaintiff that there was no express trust upon which the conveyances were made, the alleged agreement between the parties being oral; but it is claimed that a resulting trust to the plaintiff arises out of the transaction."

" The rule that on a voluntary conveyance, without consideration, a trust results to the grantor, was confined to common law conveyances, and does not apply

to modern conveyances in common form, with recital of consideration, to the use of the grantee and his heirs. Such deeds to a stranger, and *à fortiori* to a wife, exclude any resulting trust to the grantor."

Gould vs. Lynde, 114 Mass., 366.

THE ARGUMENT THAT THE STATUTE OF FRAUDS IS NOT TO BE MADE A COVER FOR FRAUD, CONSIDERED IN ITS SUPPOSED APPLICATION TO THE PRESENT CAUSE.

A court of equity always has jurisdiction to remedy fraud, accident or mistake, and in the exercise of such jurisdiction parol proof of the fraud, accident or mistake is allowed. But, unless parol proof is offered for *that* purpose, a court of equity, equally with a court of law, must refuse to hear it.

When it is sought, as in the present case, to set aside an absolute deed because of fraud it is necessary to prove that there was (1) a fraud (2) committed by the grantee (3) upon the grantor (4), which induced the making of the deed. The theory upon which the Court acts in such a case is that the grantee has *obtained the property by fraud*, and the Court takes jurisdiction to compel the grantee *to return the property*. "A man is not allowed to keep property that he has *obtained by fraud*," is the full extent of the rule. So, for example, if the grantee *by fraud obtains* property which he agrees *orally* with the grantor to hold for the benefit of the latter, or of a third person, the Court takes jurisdiction to compel the grantee *to return the property*; and, having obtained jurisdiction for that purpose, can act further to enforce the oral trust.

(1) It is necessary to show a *fraud*. The jurisdiction is based wholly on the function of the Court to *remedy*

fraud; consequently there must be a fraud in order to give the Court jurisdiction. In regard to what *constitutes* fraud, it is to be said that, while courts have avoided any definition of fraud, they have always regarded as an essential element of fraud that the one defrauded must have been *deceived* or *tricked* out of some legal or equitable right. There must have been some contrivance by which he was cheated. He must have been put into some situation in which he would not voluntarily have placed himself had he known all the circumstances.

(2) (3). It is necessary to show that the fraud was committed by the *grantee* upon the *grantor;* for otherwise it would not be true that the property *was obtained by fraud.* A fraud not committed by the *grantee,* nor known to him (which would be the same thing as if committed by him), could not affect his title. A fraud not committed upon the *grantor* could not have been the *inducement* of the conveyance.

(4) The fraud must have been the thing which *induced* the conveyance. A fraud which did not *cause* a transaction is not sufficient to enable the Court to set t aside.

A valid conveyance, even without consideration, will not be set aside or in any way impeached, unless there was fraud, accident or mistake in making such conveyance.

Of course one who obtains the legal title to land which is bound by a trust, of which he has notice, holds the legal title subject to the trust. But there must in such a case have been a valid enforceable trust attaching to the *land* in the hands of the grantor, and this is just precisely what is wanting in this cause. If

the alleged trust existed only by parol, no trust attaches to the land in the hands of the grantee (see *Peckham vs. Balch, infra*, p. 66, and other cases on this Brief). A conveyance in fraud of creditors may also be set aside by creditors who have obtained judgment, execution and a return of *nulla bona* or its equivalent. Considering these two grounds for impeaching a conveyance, the rule has sometimes been stated as follows: In the absence of fraud, accident or mistake, a voluntary conveyance is valid as between the grantor and grantee, and can be impeached only by creditors and persons having superior equities. Such a conveyance can never be impeached on the ground that the grantor had made an oral contract to convey to some one else, nor on the further allegation that it was a "fraud" not to perform the oral contract.

This rule has been repeatedly recognized by Courts in language too plain to be mistaken.

"There is no doubt that, if any *fraud* had been alleged, *by means of which the defendant procured the conveyance* from his brother to himself, or any mistake by which the instrument was made absolute, instead of expressing the trust intended, parol evidence would have been admissible to show such fraud or mistake. * * * *The only fraud alleged, therefore, is that of the defendants now claiming the property in violation of the parol trust:* and whether that constitutes such a fraud as will justify a court of equity in overturning the written contract of the parties, upon parol evidence, is the question presented."

PAINE, J., IN RASDALL VS. RASDALL, 9 WIS., 379, 385.

"The words of Lord Justice TURNER, in the case of *Lincoln vs. Wright (4 DeG. & J., 16)*, where he said: 'The principle of this Court is that the Statute of Frauds was not made to cover fraud,' express a princi-

ple upon which this Court has acted in numerous instances, where the Court has refused to allow a man to take advantage of the Statute of Frauds *to keep another man's property which he has obtained through fraud.*"

PER SIR W. M. JAMES, L. J., in *Haigh vs. Kaye, L. R., 7 Ch. App., 469.*

In *Ratliff vs. Ellis*, 2 Iowa, 59, there was a deed by Ratliff (whose heirs the plaintiffs are) to Ellis. There was parol evidence to show that Ellis was to hold for the benefit of a third person (namely, Ratliff's wife).

WOODWARD, J., gave the opinion of the Court:

"But this whole mass of testimony does not help us to dispose of the deed from Ratliff. Here the Statute of Frauds, and the common law rule of evidence, in relation to changing or adding to written instruments by parol evidence, meet us. *Parol evidence is not permitted to change an absolute deed into one of trust, unless there be fraud, accident or mistake alleged, and to be proved. We may personally be convinced by the testimony that the grantee was to hold in trust, but the peremptory rule of the law will not permit us to declare it so.* That law has said, that such a trust can be created or declared by writing *only.*"

"The Statute of Frauds and the rule of evidence will not permit a deed absolute on its face to be changed into one of trust by parol, *unless there be fraud accident or mistake.* There is nothing of the kind charged in the bill; indeed, the allegations are that *the deed was executed voluntarily, and without accident or mistake or fraud on the part of her son in procuring it.*"

"There is nothing in the deed from the mother to her son expressing any design or intention to grant anything different from what was conveyed, and this bill cannot be sustained, in my opinion, without overturning a rule of law and of evidence established for the security of all property."

NELSON, J., in *Jones vs. Van Doren*, 18 Fed. R., 619, 621.

"There is *no allegation of fraud, accident or mistake.* It is, indeed, alleged that when the deed was executed

it was agreed by the parties that the estate should be holden in trust by the grantee for the benefit of the grantor, and that a writing to that effect should be thereafter executed; that the grantee frequently acknowledged the agreement, but that owing to negligence and accident, or some unaccountable cause of delay, the same was postponed, &c., until she died, without making any writing to declare the trust," &c.

Dean vs. Dean, 6 Conn., 285.

In *Dean vs. Dean* no consideration was really paid. There was, too, the same expression of a willingness to make the subsequent agreement that there was in the present case to make a conveyance to Moore.

"There is *no fraud, mistake or accident alleged in the execution of the deed.* On the contrary, it plainly appears that the parties to this conveyance knew its contents, and intended that it should be executed in the form it was."

Morrall vs. Waterson, 7 Kansas, 199, 204.

IT IS IMPORTANT TO NOTICE that these doctrines are recognized and applied in MICHIGAN, where the land here in question is situated. Thus, in *Jackson vs. Cleveland*, the Supreme Court of Michigan says:

"A voluntary deed, which purports to be for the beneficial use of the grantee, and *which was made deliberately and without mistake or contrivance*, does not differ from any other deed in binding the grantor, AND CAN ONLY BE ATTACKED BY THOSE HAVING SUPERIOR EQUITIES WHICH THE GRANTOR HAD NO RIGHT TO CUT OFF—as creditors and the like. The only case approaching it is that where an equity is raised against a grantee *in favor of the person who paid the purchase money. This trust is now abolished by our statutes, where the person paying the money had consented to the deed being thus made.* And it could always be rebutted by showing that the land was intended to vest beneficially."

Jackson vs. Cleveland, 15 Mich., 94, 102.

So in NEW JERSEY.

"I have remarked that in both these cases (cited) there were facts in proof evincive of *fraud on the part of the purchaser*, and this, in my estimation, is the correct ground on which to rest the jurisdiction of equity to enforce these parol contracts. Whenever an agreement of this nature has been entered into, *and the purchaser has made use of it*, or of any other contrivance, *to obtain the property* in execution for an inadequate price, or to the oppression of the defendant (in the execution sale, who of course is in the position of grantor), the right to equitable relief is clear."

Merritt vs. Brown, 6 C. E. Green (N. J. Eq.), 401, 404.
See also, *Philbrick vs. Delano*, 29 Maine, 410,
Perkins vs. Cheairs, 2 Baxt., 194.
Lantry vs. Lantry, 51 Ill., 458.

It is not pretended by the plaintiffs that in the present case there *was* any fraud committed by the grantee, Mrs. Moore, upon the grantors, McDonald and McKay, and I have already shown that no one had any *equity in the land* which the grantors (McDonald and McKay) had no right to cut off" (see *Jackson vs. Cleveland, supra*), and under Point IV., *infra*, I shall show that no *personal* equity in Monroe (if such an expression may be used), existed against the grantee, Mrs. Moore.

(B) THERE WAS NO FRAUD UPON MONROE OR HIS HEIRS, IN THE EXECUTION AND DELIVERY OF THE DEED BY MCDONALD AND MCKAY TO MRS. MOORE.

As such fraud seems to be the *sole ground* of the opinion and decree below, I must be pardoned for examining the point with some fullness; and also for show-

ing that if there was such fraud the complainants were not entitled to the relief sought and decreed.

Monroe or his heirs had no estate or interest in the land, legal or equitable, and therefore no legal or equitable right of which they could be defrauded by the conveyance to Mrs. Moore.

The question is not of a right against Moore, which is a merely personal right, and not a right to property. Monroe had no right *in the land*, but at most (even if the contract was not rescinded), only a *personal* right against *Moore*, which passed to Monroe's *personal* representatives, and which they still have. That *personal* right, against *Moore only*, is the only right which Monroe or his representatives ever had, and no attempt even has been made to defraud them of that right.

It is true that there is such a thing as a fraud upon third persons, and it is a general rule of law that parties to contracts and to other acts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons. This rule was stated by Lord HARDWICKE in the leading case of *Chesterfield vs. Janssen*, 2 Vesey, Sen., 156, 157, and has been followed in a variety of cases since. But in all of these cases either (1) there is some *legal or equitable right of property in the third party*, of which he is deprived by fraud; or (2) the third party *is induced to do or to refrain from doing some act* in regard to which he had a right *not to be influenced by fraud*. This is the strict limit set by the authorities. These cases are treated of in *Kerr on Fraud and Mistake*, under the title "*Fraud upon Third Parties.*" See also *Story Eq. Juris.*, § 328 *et seq.*

The cases that come under (1) *supra* are: fraud upon

creditors; purchasing trust property with notice of the trust; voluntary conveyances in fraud of subsequent purchasers. The cases that come under (2) are: fraud in relation to various contracts incidental to marriage; fraud in respect to sales by auction, and possibly other cases, where the third person is by fraud prevented from acting freely according to his own judgment.

In the present case it is clear that the conveyance by McDonald and McKay to Mrs. Moore did not affect any *right of property* in Monroe or his heirs. Neither Monroe nor his heirs had any right of property in the land, but at the most only an expectancy, which neither McDonald and McKay nor Mrs. Moore were bound or could be compelled to respect. Nor was Monroe induced to do or to refrain from doing any act by any of the parties to the conveyance to Mrs. Moore.

It was not a fraud to defeat the expectancy of Monroe. There is, it is true, a class of cases in which equity will relieve when *by fraud one prevents* the doing of acts which are intended to be done for the benefit of third parties, and procures the doing of the acts for the benefit of himself or of some one else. The ground on which equity grants relief in such cases is that *the benefit has been obtained by a fraud upon the benefactor*, and not that the third person has been deprived of the expected benefit. For, if the prospective benefactor *voluntarily* deprives the intended beneficiary of the intended benefit, the latter cannot complain; and it makes no difference whether the benefit be retained by the prospective benefactor, or be conferred upon some one else. Nor does it make any difference that the benefactor is *requested* to convey to some one else, provided

he acts *voluntarily* in so conveying, and is not induced by fraud.

In the present case it is clear that McDonald and McKay acted voluntarily, and that no fraud whatever was committed upon them.

The rules on this subject are well laid down in *Bigelow on Law of Fraud* (p. 13, Par. 1) :

" According to the definition *fraud can only be perpetrated upon rights, i. e., upon legal rights (as distinguished from merely moral rights).* There may, indeed, be fraud in morals, where no right under the municipal law may exist; but with this, though it may not differ in its qualities from fraud under the law, we are not concerned. The fraud we are dealing with is the fraud that, when perpetrated, may be matter for the courts to remedy; it must concern legal rights (or the equivalent), in the technical sense of the term. A single illustration will suffice. By representations which he knows to be false, A induces B to alter his will, already executed in favor of C, and to leave nothing to C. Discovering the facts after B's death, C sues A for fraud. The action cannot be maintained, A having infringed no legal right of C."

Bigelow on Fraud, Edition of 1888, p. 13.

Professor POLLOCK, in treating of the subject of fraud, says : " It (the terminology) has been affected by complication and confusion arising from more than one source. The most frequent of these has been the unfortunate use of the term Fraud in the Court of Chancery as *nomen generalissimum.* The probable historical explanation of this habit is that in earlier times it was the only means of extending and completing a beneficial jurisdiction; but in itself it is open to grave objection on practical as well as scientific grounds. *After having given us enough and too much of such phrases as "constructive fraud," conduct "amounting to fraud in the contemplation of a court of equity," transactions "fraudulent in the eyes of this Court," and the like descriptions, under which it is possible to bring almost anything, it now stands judicially condemned.* Lord BRAMWELL said (as Lord Justice) in the Court of Appeal in

1878 (in *Weir vs. Bell*, L. R. 3, Ex. D, 243): 'I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. *There can never be a well-founded complaint of legal fraud, or anything else,* EXCEPT WHERE SOME DUTY IS SHOWN, AND CORRELATIVE RIGHT, AND SOME VIOLATION OF THAT DUTY AND RIGHT. And when these exist it is much better that they should be stated, and acted on than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty.' *Legal or constructive fraud, then, may be discarded as a worse than useless figment.*"

Pollock on Contracts, 4th Ed., pp. 479, 480.

See also *Joliffe vs. Baker*, L. R., 11, Q. B. D., 255, 270, where the language of Lord BRAMWELL, *supra*, is quoted and approved.

The case cited by Bigelow, *ubi supra*, is *Hutchins vs. Hutchins*, 7 Hill (N. Y.), 104. Opinion by Chief-Justice NELSON:

"Fraud without damage or damage without fraud, gives no cause of action; but where both occur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property of the party; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

"Now, testing the plaintiffs' declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of

his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect."

Hutchins vs. Hutchins, 7 Hill (N. Y.), 104, 108.

See also,

Kimball vs. Harman, 34 Md., 407.
Heywood vs. Tillson, 75 Me., 225.

"At the common law (*i. e.*, independently of statute), there was not any fraud remedied, which should defeat an after purchase, but that only which was committed to defraud a former interest: *Quod fuit concessum per curiam.*"

Per YELVERTON, in *Upton vs. Basset*, Croke's Eliz., 445.

An assignment of copyhold premises, which were not before the assignment subject to debts, cannot be fraudulent as against creditors, *because it deprived them of no right* wich they would have had if the assignment had not been made.

Mathews vs. Feaver, 1 Cox. Ch., 278.

THAT THE PARTY MUST HAVE A LEGAL OR EQUITABLE RIGHT in order that he may be defrauded is also clearly shown in the following opinion:

There is a statute in Iowa to prevent conveyances in fraud of creditors, purchasers and other persons. In regard to "other persons" the Court says:

"If there were no creditors or purchasers the conveyance could not be fraudulent as to them. The words "other persons" must be construed to mean some one who had or might have *a claim or right to the property conveyed,* WHICH MIGHT BE ENFORCED AT LAW

OR EQUITY. Subject thereto the right of the plaintiff to dispose of his property as he saw proper was absolute and unconditional. His intent in doing so was wholly immaterial, provided no one but himself was injured or had cause to complain."

Per SEEVERS, J., in *Day vs. Lown*, 51 Iowa, 369.

See also *Bell vs. Johnson*, 111 Ill., 374, 379; *Love vs. Belk*, 1 Ired. Eq. (No Car.), 163.

BUT EVEN IF IT COULD BE HELD THAT THE DEED TO MRS. MOORE WAS A FRAUD UPON MONROE, THE COMPLAINANTS ARE NOT ENTITLED TO MAINTAIN THEIR PRESENT BILL OR TO THE RELIEF SOUGHT BY IT.

If, however, there were a fraud upon Monroe or his heirs the remedy would be not a conveyance to the heirs, but the repayment of the purchase money; and, as the purchase money has never been paid there is no ground to claim even that remedy. This proposition supposes that there *was* fraud in the sale by Moore to Monroe, but there is no ground for saying that there was any fraud in that transaction. Monroe knew all the facts. If there were a fraud connected with the conveyance by McDonald and McKay to Mrs. Moore the remedy would be not a conveyance to Monroe's heirs, but a conveyance back to McDonald and McKay. The fact of a fraud would give no one any rights which they did not have before the fraud was committed. *Fraud has no creative force.* It can be used only as a *defense* or as a ground for *restoring* one's rights, and not for the purpose of creating rights where none existed before. Fraud is never used as a ground on which to enforce specific performance, except where it

has become *impossible to restore* to the parties the rights which they had before the fraud was committed.

Such is the case of part performance of an oral contract respecting the purchase of lands, where specific performance is enforced *only* when it has become *impossible to restore* to the parties the rights which they had before the fraud was committed (see authorities, *supra*). The question is never one of giving rights which *might have been acquired* and were not acquired, but of *restoring* the rights which have been *taken away by fraud*. It is not a question of *possible benefit* but of *reparation* for loss suffered through fraud.

"The remedy (for fraud) afforded by courts of equity does not consist in enforcing the covenants, but in rescinding the contract altogether. Such was the relief granted in the cases cited above, and indeed it is the only relief that could have been given consistently with the powers and functions of equity."

Tallman vs. Green, 3 Sandf. (N. Y.), 437.

The question is, whether the party can be *restored* to his former *status*.

Story Eq. Juris., § 774.

The remedy in equity is one of *restitution*.

Kerr on Fraud and Mistake, p. 332.

A suit in the present case for recovery of the purchase money, if that had been paid, would have furnished ample reparation for any loss that Monroe or his heirs could possibly have suffered through fraud. That would have been a *restitutio in integrum*, which is all that could have been claimed. But there *was* no fraud, and the only remedy, as I shall specifically show hereafter, *is an action at law for damages for*

breach of the covenant of warranty in Moore's deed to Monroe (see Point IV. below).

THE NON-PERFORMANCE OF AN ORAL CONTRACT WHICH IS NOT ENFORCEABLE BY REASON OF THE STATUTE OF FRAUDS IS NOT A FRAUD.

It was not, therefore, a fraud on Monroe for McDonald and McKay not to convey to Moore. Nor is it a fraud on Monroe that they conveyed to Mrs. Moore. They were not bound to convey. No trust affected the land in their hands in favor of Moore, as I have clearly shown above (pp. 17–43). Moore had no rights, legal or equitable, in the land which he could have enforced against McDonald and McKay, the owners of the land. Monroe, as the assignee of Moore, had no greater rights than Moore had in or to the land. Moore had no rights whatever. Monroe had none in the land, but did have just what he bargained for, viz.: an action on Moore's covenant of warranty for damages (see Point IV., *infra*, for cases on this specific point).

As neither Moore nor Monroe, at the date of the conveyance of McDonald and McKay to Mrs. Moore, had any right *in and to the land* which he could enforce at law or equity, it is utterly impossible that fraud can be predicated of any disposition of this land by McDonald and McKay, even though they acted as Moore desired or requested. In the event of such disposition to some one else than Monroe, the latter was not defrauded or left remediless, but left in the full possession of all that in such contingency he bargained for, viz.: a remedy for damages on the covenant of warranty.

"*The fraud insisted on, consists merely in the non-*

fulfillment of the alleged agreement, and depends, of course, entirely on the question whether there *was in fact an agreement to be performed*, and that preliminary fact the statute will not allow to be established by parol."

Johnston vs. La Motte, 6 Rich. Eq., 347.

If it were a fraud not to perform an oral contract within the Statute of Frauds, and if such fraud renderd the contract enforceable, then no contract would be unenforceable because of that statute. For one who sought performance might always allege fraud ; and to prove the fraud might show the oral contract and that the defendant had refused to perform it, and his case would be made out. If such were the law, the Statute of Frauds would have no effect, and no oral contract would be unenforceable.

THE FOLLOWING CASES ILLUSTRATE THE PROPOSITION that a refusal by McDonald and McKay to carry out their parol understanding with Moore, even if such understanding had been precise and definite, would not have been a fraud which would have given either Moore or Monroe, his assignee, a remedy in equity to enforce the parol understanding or contract.

In *Rasdall vs. Rasdall*, the Supreme Court of Wisconsin said :

" There is no doubt, *if any fraud had been alleged, by means of which the defendant procured the conveyance* from his brother to himself, or any mistake by which the instrument was made absolute, instead of expressing the trust intended, parol evidence would have been admissible to show such fraud or mistake. * * * But no such fraud or mistake is alleged here.

* * * * * * *

The only fraud alleged, therefore, is that of the defendants now claiming the property in violation of the parol

trust: and whether that constitutes such a fraud as will justify a court of equity in overturning the written contract of the parties, upon parol evidence is the question presented. Placing the relief, in such case, upon the ground of fraud, is implied by admitting that the parol evidence cannot be admitted to establish the trust for the purpose of enforcing it directly as a trust. And this is also expressly admitted. But it seems apparent to my mind that to say, in such a case, it shall be admitted to establish the fraud is equally in violation of the statute. Because the fraud consists only in the refusal to execute the trust. The Court cannot, therefore, say that that there is a fraud, without first saying that there is a trust. And the parol evidence, if admitted—must be admitted to establish the trust, in order that the Court may charge the party with fraud, in setting up his claim against it."

PER PAINE, J., in *Rasdall vs. Rasdall*, 9 Wis., 379.

So, also, by the Supreme Court of Illinois:

"One Hamlin conveyed land by a deed absolute on its face to one Rogers. An attempt was made to show that the conveyance was really in trust for certain children for whom Rogers was guardian.

"Mr. Justice SHELDON, delivering the opinion of the Court, said:

"'The sufficient answer to the claim set up in this bill would seem to be, the citation of the provision in the Statute of Frauds and Perjuries (quoting it). The deed in this case is absolute. The alleged declaration of trust is not manifested, or proved by any writing, and is, therefore, as an express trust, utterly void and of no effect.'"

"It is further urged that this case is taken out of the statute on the ground of fraud.

"*But the violation of a parol promise or trust as to an interest in land does not constitute such a fraud as will take a case out of the statute.*"

Rogers vs. Simmons, 55 Ill., 76.

The case of *Peckham vs. Balch*, in the Supreme Court of Michigan is in point. I trust the Court will read the case just cited at large. After careful examina-

tion and full reflection I can reach no other conclusion than that it is conclusive against the case at bar.

In that case there was a verbal agreement to sell land, which was not enforceable. The proposed vendor under this agreement afterwards sold, fraudulently it was claimed, to a third person. That third person was made a defendant to bill to compel a conveyance.

The Court say: "The fraud of the defendant Winter in purchasing from Mrs. Balch cannot make out an otherwise defective case for the complainant. If he could not have enforced specific performance as against Mrs. Balch, neither can he against her fraudulent grantee."

Peckham vs. Balch, 49 Mich., 179.

So, too, the case of *Shafter vs. Huntington*, also decided by the Supreme Court of Michigan, shows that as the land in the hands of McDonald and McKay was burdened with no valid trust in favor of Moore or his assignee, it is equally free of such trust in the hands of Mrs. Moore. The case was thus:

Complainants were heirs of Eliza Shafter, who was the wife of Hugh M. Shafter. Matthias Sumner died intestate, leaving as heirs said Eliza Shafter and Alonzo B. Sumner. By an agreement between these two heirs Matthias Sumner's real estate was divided. Part of it was conveyed by an absolute deed to Hugh M. Shafter under an oral agreement that he was to hold in trust for the children of himself and of his wife Eliza. Hugh M. Shafter mortgaged the premises to defendant Huntington. Suit was brought to cancel the mortgage.

The Court said:

"This testimony shows quite conclusively that the conveyance was made to Hugh M. Shafter by the consent and direction of Mrs. Shafter" (there was therefore no fraud).

"*The consideration for the deed was furnished by Mrs. Shafter* * * *; and the question arises—conceding that the land was conveyed to Hugh M. Shafter by an absolute deed, without specifying any trust, but with the parol agreement that he should take the legal

title and hold it in trust for the benefit of the children of himself and Mrs. Shafter after his death, and the conveyance was made by the express consent and direction of Mrs. Shafter—whether, under such circumstances, the trust is such as can be enforced in behalf of the children in a Court of Equity."

* * * * * *

"The fact that the conveyance was made without consideration, and was entirely voluntary, would not raise a resulting trust in favor of Mrs. Shafter or complainants."

"At the time the deed was executed to Hugh M. Shafter there was no deed or conveyance in writing subscribed by the party creating or declaring the trust; and it is equally clear that no trust was raised by act or operation of law. * * * *It can make no difference in the result whether defendant Huntington had or had not notice of the parol agreement under which the land in question was conveyed to Hugh M. Shafter. He was the owner of the legal title to that portion of the land conveyed to him by Alonzo B. Sumner, and it was not burdened with any valid trust in his (Sumner's) hands.*"

Shafter vs. Huntington, 53 Mich., 310.

In the case just cited the Supreme Court of Michigan refused to take land from the legal grantee, though the grantor had made an oral agreement to hold in trust for complainants, and although the grantee paid no consideration; and whether the grantee had notice or not made no difference. The express ground of the decision was that the *land was not burdened with any valid trust while in the hands of the grantor, and, therefore, it could not be burdened with any trust in the hands of the legal grantee.* The reasoning is fully applicable to the present case. There was as much ground for the charge of fraud in that case as in the present one. The decision is clearly in support of the point that it is not a fraud to refuse to perform an oral contract within the Statute of Frauds.

See also *Irwin vs. Ivers*, 7 Ind., 308, to the effect that the non-performance of a parol contract is not a fraud.

(C) IF THE CONVEYANCE TO MRS. MOORE BE REGARDED AS A CONVEYANCE UPON CONSIDERATION OF LABOR PERFORMED BY MOORE, STILL NO TRUST RESULTED IN FAVOR OF MOORE.

THE MICHIGAN STATUTE OF TRUSTS, which governs this case, copied from the New York Statute, is peculiar in its provisions, and is as follows:

"When a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named, as the alienee in such conveyance, subject only to the provisions of the next section." *How. Stat.*, § *5569.*

The next section merely provides that "such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration."

That only judgment creditors can set aside a conveyance in fraud of creditors see:

Miller vs. Babcock, 29 Mich., 526.

The Michigan Statute of Trusts is construed by the Supreme Court of the State in accordance with its plain language and purpose. Thus, in *Bumpus vs. Bumpus*, the Court says:

"The case is one of the purchase of lands by a party

who causes them to be conveyed to another instead of to himself; and in such a case unless the grantee gives back a written declaration of trust or some contract to convey to the purchaser, he has a legal right to retain what has been deeded to him. *There is no implied trust in favor of the purchaser* (How. Stat., § 5569)."

Per COOLEY, Ch. J., in *Bumpus vs. Bumpus*, 53 Mich., 346.

So, also, in *Weare vs. Linnell:*

"This statute (by which no trust results to the one who pays the purchase money) appears to be directly in point, and complainant's case is as plainly within it as any which could be suggested. For reasons of his own he has purchased lands in the name of another. No deceit or fraud has been practiced upon him; no agreement was made with him which has been violated. He now seeks by parol evidence of having paid the purchase price, and of what his purpose was in so doing, to establish rights in himself in opposition to the apparent title. This is the very thing the statute above quoted was passed to preclude."

COOLEY, J., in *Weare vs. Linnell*, 29 Mich., 224, 227.

So, also, in *Newton vs. Sly:*

"Our statute has abolished the resulting trusts which formerly arose in favor of parties actually paying the consideration for lands conveyed to others. Now, if the conveyance to the grantee is made with the consent of the one who pays for the land, the latter can claim no interest in the estate (*Comp. L.*, § *2637*). Nor can an express trust in lands be created by parol (Comp. L., Secs. 3177–8)."

CAMPBELL, J., in *Newton vs. Sly*, 15 Mich., 391, 395.

IV.

The effect of the Deed from Moore to Monroe considered, and shown for other reasons not to give any right to maintain the present bill.

The rights of the complainants depend exclusively upon the deed from Moore to Monroe, dated October 18th, 1875 (Record, pp. 17, 18), and upon the covenants therein contained, and these not only do not give any right to the relief sought, but by their necessary legal effect negative any such right.

Moore, in executing that deed and in the sale of the one-sixth interest to Monroe, practiced no fraud upon him, nor was there any accident or mistake in the deed whereby anything was omitted which the parties intended to put therein. It is enough in this case, that the bill of complaint does not allege, and is not grounded upon the proposition, that there was any fraud in the transaction between Moore and Monroe which led up to the execution of the deed, or any accident or mistake whereby something was omitted therefrom which under the contract between the parties was intended to have been inserted.

But if we look *dehors* the written instrument into the facts, we find that it is clearly established that there was no fraud, accident or mistake; in fact, no fraud, accident or mistake has up to this time been claimed by the complainants. Moore did not pretend to Monroe, at the date of the execution of the deed, that he had any title whatever to the lands, but only an ex-

pectation of getting a title from McDonald and McKay in the future. On the contrary, he told him he had no title. The only witnesses on the subject of the bargain are Moore *(Record, p. 37)* and Mrs. Monroe, now Mrs. Crawford (Record, pp. 61–73). From Moore's testimony it appears that the idea of purchasing an interest from Moore originated with Monroe *(Record, p. 37)*. The price of $250 was agreed upon. This appears by the deed, by Moore's testimony, and incidentally by Mrs. Monroe's, who speaks about the payment of $10 on the price. Moore's statement is as follows :

> " I told him (Monroe) then that I had not received my deed from McDonald and McKay, but that I expected to receive it, and probably it was made out then. I didn't know anything about it. This was a very short time after we had entered it. He said that was all right for me to give him a warranty deed. I done so. He paid me the ten dollars. He said, " I will give you ten dollars." He gave me ten dollars, and the note was made for two hundred and forty dollars. That is all of that transaction " *(Record, p. 37)*.

Now, I do not care whether Moore's testimony on this point is rejected or not. The deed *(Record, p. 17)* and the note for $240, produced nine years afterwards by Mrs. Monroe, now Mrs. Crawford *(Record, p. 61)* embody the contracts and the only contracts, as the parties then made them and committed them to writing. I repeat, there is not the slightest evidence or up to this time any pretense that these two contracts do not embody, contain and set forth just what the parties intended, and all that they intended, or that they were made by reason of any mistake or misapprehension of any kind. I repeat, therefore, that the rights of the parties depend upon these two instruments—the deed and the note. The contract, on Moore's part, was *exe-*

cuted by the making and delivery of the deed; on Monroe's part, except as to the payment of the ten dollars, it was *executory*.

Confining our attention for the present to the deed (the only instrument made for the benefit of Monroe), the first inquiry is, what rights and liabilities were created by this instrument and by its covenants? As a deed of conveyance, using the word in its proper sense, that is, as an instrument conveying *an estate or interest in lands*, it never became operative, for the reason that Moore had no estate or interest in the land on which it could operate. Confessedly, it did not become operative as a deed of conveyance of land *at the date* of its execution and delivery, for the reason that Moore had at that time no title or interest in the land which the deed purported to convey. It never became operative *after* its execution and delivery, because Moore, the grantor, never acquired any estate or interest in the lands on which the deed could operate by way of estoppel. The deed being an executed instrument would *merge any previous contract of sale*, and the rights of the parties would depend upon the deed and its covenants, there being no fraud or mistake, and upon these alone. It is elementary law that where, in a deed of lands, there is no fraud, and the vendee takes no covenants, he is without remedy, either at law or in equity, if the vendor has no title; and such a deed will not operate by way of estoppel in the event that the grantor afterwards acquires title. Hence, to provide against the contingency of a failure or want of title, personal covenants have been invented such as are inserted in this deed. Their character and legal effect are perfectly well understood. The testimony of Moore,

if it is regarded, shows that in point of fact Mr. Monroe understood that his *recourse was on the warranty in case Moore failed to get title.* If Moore's testimony be rejected, the legal effect is the same.

THIS DEED CONTAINS *(Record, pp. 17, 18)*:

1st. A covenant that Moore is "well seized of the above granted premises in fee simple;"
2d. "That they are free from all incumbrances whatever;" and
3d. "That he will, and his heirs, executors and administrators shall, warrant and defend the same against all lawful claims whatsoever."

Whatever rights these covenants gave to the grantee, he has, *and no more.* Whatever liabilities these covenants by their true construction and legal effect impose upon Moore he is under, and he is under no other, different or greater liabilities. What were these liabilities? When these are ascertained, the corresponding rights of the covenantee (Monroe), are likewise ascertained. All three of Moore's covenants had been broken when this bill was filed, and long before. Moore was not seized of the premises; they were not free of incumbrances; and he had no title, and never had. Monroe never entered into possession in virtue of the deed or otherwise, and never had any right of entry or any right to gain possession by virtue thereof. In *Duvall vs. Craig,* 2 Wheat., 45, 61, this Court says:

"If the grantee be unable to obtain possession or seizin from a person claiming and holding under an elder title, this would certainly be equivalent to an eviction and a breach of the covenant."

S. P. *Rawle on Covenants,* 3d Ed., pp. 254, 255, and cases cited.

If Monroe had brought an action against Moore on the covenants in this deed, since it is admitted and found by the Court below, that the $240, part consideration money, was never paid, and if it be further admitted for the argument, that the contract of rescission (as we claim it) whereby the ten dollars was actually repaid to Monroe, was never made, the extent of his recovery would have been the ten dollars and interest; that is to say, the consideration money paid and interest thereon. It is obvious from Moore's testimony, if it be received, that at the time this was all that Monroe expected to get in case the covenants were broken. But whether Moore's testimony be regarded or not, such is the legal effect of the contract which the parties deliberately made. That contract is, that Moore, the covenantor, is liable on its covenants to the extent imposed by law; to wit, the consideration money and interest, and no more.

Now I INSIST, with confidence, that there is no authority to extend the covenantee's rights or the covenantor's liabilities beyond those created and imposed by the written instruments which they then made. A very laborious research into the adjudged cases has enabled me to find no case in which it has ever been adjudged that the covenantor was liable to any greater extent than as above set forth. On the contrary, two express adjudications have been found, by courts of high respectability, (referred to hereafter in another connection), holding that equity cannot, under the undisputed facts of this case, give any greater or different effect to the covenants than are given to them in a court of law.

Taite vs. Miller, 10 Ohio, 382.
Tallman vs. Green, 3 Sandf. (N. Y.), 437.

Tell me, on what principle it is that a court of equity is justified in erasing the express and well defined contracts put in these deeds, with their well-known and ascertained liabilities, and then writing in the instrument in the place of the contract which the parties did make another supposed contract which they never made? On what principle is it that a court of equity can convert this *executed* contract, with its well ascertained liabilities, and declare it to be, not an executed, but merely an *executory* contract, with the different rights and liabilities which attach to an executory as distinguished from an executed contract.

In England very generally, and to some extent in this country, a distinct "*covenant for further assurance*" is inserted in deeds of conveyance in addition to covenants of seizin, against incumbrance, warranty, &c. Such covenant of further assurance has a distinct office, and it is to create and impose the duty upon the covenantor specifically to execute any further assurances, based either upon defects in the instruments as executed, or upon an after acquired interest, for the benefit of the grantee. But I repeat, no instance has been found, and it is believed none exists, in which a court of equity has undertaken to give to the covenant of seizin or warranty any different effect than what those covenants would have in a court of law.

In *Tuite vs. Miller*, *supra*, the complainant attempted to compel the grantor in a deed which contained a covenant of warranty to extinguish an outstanding dower interest, but the Supreme Court of Ohio, speaking through Chief-Justice LANE, said:

"There is a well established chancery jurisdiction over certain covenants. The Chancellor will exercise

a restraining power where the covenantor, contrary to his stipulation, disturbs the tenant by his own act, and *he will enforce the specific performance of the covenant for further assurance.* BUT WE FIND NO CASE OF INTERFERENCE ON THIS SIDE OF THE COURT IN RELATION TO THE COVENANT OF WARRANTY."

The cases are numerous in which it has been distinctly held that where a deed contains no covenants, or where the only covenants in the deed were those of seizin and good right to convey, or against encumbrances, and the grantor afterwards acquires title, he is not even estopped to deny his seizin, &c., at the time of making his covenants (see cases *infra*), and it follows from this holding that he is not obliged, either by his deed or by those covenants, to convey the after-acquired title he may lawfully hold. Such after-acquired title is affected with no trust. I repeat: there is no case giving any greater operation to a covenant of warranty in this respect, but as above said, the contrary has been expressly adjudged.

In this connection it is important to observe and remember that by statute in Michigan it is enacted that "*no covenant shall be implied* in a conveyance of real estate whether such conveyance contains special covenants or not." *How. Stat.*, § 5655. In view of this statute, the decisions and the foregoing considerations, I confidently submit the proposition that there is no authority in a Court of Chancery to give to the covenants in the deed to Moore any other effect and different operation than they have in a court of law; and I deny with equal confidence, the right of a court of equity, there being no fraud, accident or mistake, to lay its hands on this deed and on its covenants and

convert it from a plain executed contract with definite rights and liabilities into an executory contract with supposed different rights and liabilities.

See authorities *infra* proposition (B), p. 82.

If these views are sound (as they are believed to be), they take up the complainants' case by the roots, and it needs no further consideration. The foregoing observations and conclusions are entirely consistent with the few cases of doubtful soundness such as

Goodson vs. Beacham, 24 Ga., 150,

or the mere *dicta* in

Way vs. Arnold, 18 Ga., 181.
Chew vs. Bennett, 11 Sar. & Rawle, 389,

(and possibly there may be others of a like character which may be referred to by the complainants) which hold where a grantor has conveyed with a covenant of warranty *and has afterwards actually acquired a title*, that a court of equity will entertain a bill to compel him to convey such after-acquired title to the grantee, the ground of the decisions being the supposed necessity of equitable relief in order to avoid an apparent break in the title. Even such equitable intervention would not be necessary where it is held that in such cases the after-acquired title *ipso facto*, enures, either directly or by way of estoppel, to the benefit of the grantee. (That an estoppel is sufficient if the grantor afterwards acquires title, see the analagous case of an estoppel of a grantee who voluntarily destroys his grantor's deed, 3 *Wash. Real Prop.*, 4 Ed., pp. 305–307). In the few cases just mentioned the Courts in giving the reasons for the decisions have said that they would treat the covenants as contracts

to convey the after-acquired title and enforce them. But the radical difference between those cases and the case at the bar is that there the grantor and covenantor afterwards *actually acquired the title* which the Courts held he would be bound to convey. They did not hold or even intimate that a deed with those covenants *imposed any obligation on the grantor to acquire a title and then to convey it.*

But if the foregoing views are unsound I proceed to show upon other considerations that the deed from Moore to Monroe gives no right to the complainants to maintain the present bill.

By the common law no mere possibility could be assigned to strangers.

Coke Lit., 265 a; 3 Washburne on Real Prop., § 465.

As Moore had no title, legal or equitable, when he made the deed to Monroe, that deed did not operate as a conveyance. *Qui non habet, ille non dat.* If, however, Moore *had* subsequently acquired the title that deed might have become operative by estoppel, but such estoppel would rest entirely on the covenant of warranty.

"And no title not *in esse* will pass by deed unless this contains a covenant of warranty, in which case it operates as an estoppel as to such future title."

*3 Washburn on Real Prop., *466.*
See also Rawle on Covenants, 3d Ed., p. 409, and authorities there cited.

(A) WHATEVER MAY HAVE BEEN THE EFFECT OF THE DEED AS TO MOORE, IT HAD NO EFFECT AS TO MRS. MOORE, AND IT IS THEREFORE IMMATERIAL IN THE PRESENT CASE.

MRS. MOORE IS NOT ESTOPPED BY THE DEED. It is *not Moore* who holds the title to the land in question, but *Mrs.* Moore. *She* is the one who shows that Moore had no title when he gave the deed to Monroe, and she is not estopped, for she was neither a party to the deed nor a privy claiming under a title traced through that deed, nor did she derive her title from Moore. Her title came from McDonald and McKay, from whom she derived, as I have shown in Point III., a clear title. Even if the conveyance had required for its support a consideration (and it did not), yet, under the Michigan Statutes (*supra*), no trust would have resulted to Moore, but Mrs. Moore would still hold *in her own right and for her own use.*

After the deed to Mrs. Moore, if McDonald and McKay and Mr. Moore had all attempted to divest the title out of Mrs. Moore they would have failed. She held absolutely.

Mrs. Moore is a stranger to the deed from Moore to Monroe. As against her, therefore, there is no estoppel.

"Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that regularly a stranger shall neither take advantage of nor be bound by an estoppel."

Coke Lit., 352a.

See also

4 Comyn. Dig., Tit. Estoppel.
Bigelow on Estoppel, 2d Ed., p. 241.

The deed was made by Moore before he married Mrs

Moore, and was not signed by her *(Record, fol. 31, p. 17; p. 10, fol. 21)*.

The only basis of estoppel is the covenant of warranty in the deed, and as Mrs. Moore was not a party to the deed, she did not make any contract of warranty, and hence she is not estopped by the deed. There is nothing in the relation of husband and wife to bind her by her husband's deed.

Even if a wife join in a warranty deed by her husband in order to bar her dower, she is not estopped by such warranty deed from setting up a title subsequently acquired by her. *A fortiori*, where the wife not only did not sign the deed but was not married to her husband when he made the deed, she is not bound by the covenants therein, nor can she be estopped from setting up an after-acquired title in opposition to such deed.

Though it is held in some jurisdictions that the covenant of warranty in a deed in which a wife joins with her husband "will estop her and those claiming under her from setting up any claim to an after-acquired title," yet that rule "has been by no means universally recognized; and in some States the operation of such a rule is prevented by statutory enactment."

See *Rawle on Covenants*, 3d Ed., p. 433.

"A wife's covenant in her husband's deed is a mere nullity; the statute not empowering her to make contracts generally, but only in respect to her own property" (Comp. L., § 4803).

Per COOLEY, Ch. J., in *Kitchell vs. Mudgett*, 37 Mich., 81, 84.

However the decisions may be in jurisdictions which hold that the wife is estopped *when she joins in the deed*,

it is clear that no Court in any jurisdiction could rightly hold that the wife was estopped when she not only had *not signed* the deed, but was not even married to her husband when he executed the deed.

The cases cited *infra* are decided on the principle that a married woman cannot at common law bind herself by a contract (see 2 *Kent's Com.*, 167; *Jackson vs. Vanderheyden*, 17 Johns., 167). Hence, she is not bound by a covenant of warranty; and as that covenant is the only basis for an estoppel, she is not estopped from setting up a title subsequently acquired by her. *A fortiori, she is not estopped where she did not sign the deed or make the covenant.* Even if it be objected that now by statute a married woman can make a contract, she is, of course, not bound or estopped by a contract which she did not make.

A wife *joined* in a warranty deed with her husband conveying *his* land. The wife afterwards acquired title in her own right.

Held, that she was not estopped by the former deed with its covenants of warranty from setting up the title afterwards acquired by her.

Childs vs. McChesney, 20 Iowa, 431.

(The head-note in the report, 3, second paragraph should read "*his* real estate," not "*her* real estate.")

This decision is important since it was made in a State whose statutes make a married woman discovert as respects deeds and contracts relating to her own property or estate.

A wife joined in a warranty deed with her husband in a conveyance in fee simple of real estate to which *he* held the legal title as security for money. The conveyance was in trust for an estate under which the wife claimed as heir. It was, therefore, necessary for

the wife to trace her t itle through the very deed in which she had joined. Yet it was held, and rightly, that even joining in the deed (not merely releasing dower) did not bind her to the covenants of warranty, nor bar her title afterwards acquired as heir.

Schaffner vs. Grutzmacher, 6 Iowa, 137.

A married woman joined with her husband in a conveyance of land of which they were seized in *her* right, and also joined in a covenant of warranty. *Held*, she was not bound by the covenant of warranty.

Wadleigh vs. Glines, 6 N. H., 17.

Land was conveyed to a husband and wife jointly. She joined in a conveyance thereof by him in token of her release of dower "and of her free assent thereto" without being named in the granting part of the deed. *Held*, this did not preclude her from asserting title to the land after the death of her husband.

Wales vs. Coffin, 13 Allen, 213.

A wife joined in the execution of the deed "in token of her relinquishment of her right of dower in the premises." The property which the deed purported to convey was the wife's property. Even after a lapse of twenty-nine years her heirs were not estopped to deny that the title was in the husband at the time of his conveyance.

Raymond vs. Holden, 2 Cush., 264.
See also, *Wright vs. DeGroff*, 14 Mich., 164.

(B) THE DEED FROM MOORE TO MONROE WAS NOT A CONTRACT TO SELL OR TO CONVEY TO MONROE AND IT CANNOT BE SO CONSTRUED OR HELD.

The contract to sell or to convey was what preceded the deed to Monroe. *The contract was to make the deed, and was specifically performed and ended by the deed to Monroe.* After the deed there was no longer any contract to sell or to convey, and, no fraud or mistake

being alleged, all rights of Monroe under the formerly existing contract to sell or to convey were merged in the rights under the conveyance. To such an extent is this true, that, when the vendor is bound by a valid written contract to convey a good title, and he makes a conveyance, which the vendee accepts, of such title as he has, and it afterwards turns out that the vendor had no title, the vendee has *no remedy under the contract to sell or convey,* and none under the deed of conveyance unless it contains covenants for title. A court of equity cannot introduce new terms into the deed, nor imply any contract which the parties have not themselves put there. Moreover, in the interpretation of such covenants as the parties have introduced, the Court is bound by the strict rules of law as to the meaning of those covenants. A Michigan Statute expressly enacts that no covenant shall be *implied* in a conveyance.

How. Stat., § 5655.

" It is a familiar doctrine, that upon the execution of a deed or written contract, all previous representations or conversations are merged in the writing, which is deemed to contain the stipulations finally agreed on between the parties, and by it alone, if there be no fraud, all their rights are to be determined. It is also well settled that the party who accepts a deed upon the purchase of real estate is confined, upon a failure of title, to the covenents in his deed, and if he has taken a deed without covenants, he has no remedy at law or in equity. The only exception is where the contract or some of its stipulations have been induced by fraud (Abbott vs. Allen, 2 J. C. R., 519)."

Tallman vs. Green, 3 Sandf. (N. Y.), 437.

" The distinction between the rules which govern the the relation of vendor and purchaser before and after

the execution of the deed—*while the contract is still* EXECUTORY, *and after it is* EXECUTED—is a broad and familiar one. Although the general principles of the contract of sale of real estate, both in this country and in England, exact less from the vendor than the rules of the civil law demand, yet, while the contract is still *executory*, they recognize and enforce the right of the purchaser to a title clear of defects and incumbrances, and this right, it has been often said, is one not depending for its origin upon the terms of the contract, but is given by the law; nor, except in particular cases, is it affected by the nature and extent of the covenants for title which the purchaser is to receive."

"*But when the deed of conveyance has been delivered, a different rule applies. The contract is then executed*, and any inconsistencies between its original terms and those of the deed are, in general, to be explained and governed solely by the latter, into which the former is merged, and by which the parties are thereafter to be bound, *and the purchaser's only right to relief*, EITHER AT LAW OR IN EQUITY, *from defects or incumbrances, depends, in the absence of fraud, solely upon the covenants for title which he has received.*"

Rawle on Covenants, 3d Ed., p. 611.
See also, *Sugden on Vendors and Purchasers*, 684.
Dart on Vendors and Purchasers, 363.

"Courts of equity do not make new contracts for parties, or relieve them from the effects of those which they have fairly and deliberately made. They will interfere in cases of fraud, of accident, or mistake; but then it is on the ground, either that there was no valid contract, or that the contract actually made by reason of accident or mistake is different from the real intentions of the parties. In the other, they make it what the parties originally intended it to be, if it can possibly be carried into effect according to their intent. *But they never introduce a new stipulation into the agreement*, and especially one which the parties themselves might have introduced, had they thought proper.

* * * In the ordinary case of a sale of land, the possibility that the title may fail, is a consideration that enters into the views of both purchaser and seller.

If the purchaser does not wish to assume the risk of the title, he protects himself by covenants."

Mason, J., in *Platt vs. Gilchrist*, 3 Sandford's S. C. (N. Y.), 118.

IN THE DEED FROM MOORE TO MONROE there are three covenants (1) of seizin, (2) against incumbrances, and (3) a general covenant of warranty (Record, fol. 32, p. 18). Of these three covenants, only one could have any effect by way of estoppel.

Where one conveys *without a covenant of warranty*, a subsequently acquired title does not enure to the benefit of the grantee *even as against the grantor himself*, or his heirs.

Rawle on Covenants, 3d Ed., p. 409, and cases there cited.
See also, *Jackson vs. Wright*, 14 Johns., 193.
Clark vs. Baker, 14 California, 612, 627–629.

Where, however, one conveys *with a covenant of warranty, if he afterwards acquires the title*, such after-acquired title enures by way of estoppel to the benefit of the grantee. *If he does not afterwards acquire the title*, the vendee has a remedy upon the covenant of warranty for *damages*, and that is his only remedy. The covenant is not a *real covenant* in the sense that it is a covenant to convey *land*, like the old common law warranty, but only a *personal* covenant sounding in *damages*, and running with the land until breach.

The only covenant in the deed which could possibly have the effect of a contract to convey is the covenant of warranty. But all the authorities agree that the covenant of warranty is a personal covenant, yielding damages only, and not land, except in the special case where the grantor afterwards acquires the title himself,

in which case the title passes to the grantee in the warranty deed by virtue of an estoppel. But the very fact that an estoppel is necessary in such a case shows that the covenant of warranty does not have the effect of a contract to convey. An estoppel exists only to prevent a party from showing a fact, which, if shown, would defeat the case made by the other party. But if a covenant of warranty had the effect of a contract to convey, then the grantor could not defeat the case of the grantee by showing that he (the grantor) had no title at the time of the conveyance. For, if the covenant of warranty were a contract to convey, the grantor would be bound by that contract, even if he did show that he had no title at the time of the first conveyance, and would, therefore, be compelled to make a new conveyance to the grantee. An estoppel in such case would clearly have been useless, and would never have been thought of, if the covenant of warranty were a contract to convey.

That a deed *without a covenant of warranty* does not have the effect of a contract to convey is evident from the fact that a grantor in such a deed may hold the land purported to be conveyed if he afterwards acquired the title, which, of course, he could not do if he was bound by a contract to convey.

Rawle on Covenants, 3d. Ed., p. 409.
Jackson vs. Wright, 14 Johns., 193.
Clark vs. Baker, 14 California, 612, 627–629.

Accordingly, the authorities are clear and uniform that the only remedy of the grantee, in case the grantor has no title at the time, and never afterwards acquires

title, is an *action for damages* for breach of the covenant of warranty.

" Both the warranty and the covenant of warranty are sometimes spoken of as 'a covenant real,' but this must not be understood as confounding them with each other. Where warranty was alluded to as a covenant real, it was meant that lands instead of damages were, in the first instance, recoverable. When the covenant of warranty was spoken of as a covenant real, it was so termed as distinguished from covenants which did not run with the land; in other words, the old distinction seems to have been *that warranty* (the old common law warranty) *which did not bind executors, whose effect was that of a specific performance, or at least a restitution in in kind, and which yielded lands and not damages* (at least in the first instance) as a recompense, was a covenant real, *as distinguished from those which bound executors, on which damages alone were recovered*, and which were, therefore, termed personal covenants. Then, as the ancient *warranty* fell into disuse, the COVENANT *of warranty* (which was, however, by no means frequently used in England) was classed with covenants to repair, to levy a fine, &c., which ran with the land, and which, though *yielding damages*, were sometimes called real covenants, as distinguished from those which had not the capacity of running with the land."

Rawle on Covenants, Ch. VII., p. 209, 3d Ed.

" The settled rule of the common law is that an express covenant will restrain or destroy a general implied covenant: but the New York Statutes" (so also the Michigan Statutes, *How. Stat.*, § 5655) have further declared that *no covenants shall be implied in any conveyance of real estate*, whether such conveyance contain special covenants or not. *These provisions leave the indemnity of the purchaser for failure of title in cases free from fraud, to rest upon the express covenants in the deed*; and they have wisely reduced the law on this head to certainty and precision, and dismissed all the learning of warranties which abounds in the old books, and was distinguished for its abstruseness and subtle distinctions."

* * * * * * *

" The remedy by the ancient warranty never had, as

I presume, any practical existence in any part of the United States, and personal covenants have superseded the old warranty. * * * *The remedy is by an action of covenant against the grantor, or his real or personal representatives, to recover a compensation in damages for the land lost upon eviction for failure of title.*

4 *Kent Com.*, 469.

THE CASES WHICH WE PROCEED TO CITE CLEARLY ESTABLISH THAT EQUITY WILL NOT SPECIFICALLY ENFORCE COVENANTS OF WARRANTY IN DEEDS, BUT LEAVE THE WARRANTEE TO HIS REMEDY AT LAW ON THE COVENANTS.

Thus, in *Tallman vs. Green*, 3 Sandf. (N. Y.), 437, an attempt was made to compel a grantor to pay off and extinguish a quit-rent which was attached to the premises. It was an attempt to compel the grantor to prevent a breach of his covenants; but the Court decided that the covenants merely gave the right to damages, and gave no right whatever to compel the grantor to prevent a breach.

The Court said:

"It is said, however, that a court of equity will decree the performance of a general covenant of indemnity, though it sounds only in damages upon the principle on which they entertain bills *quia timet*. Whether this be so or not, the difficulty is that there is here no covenant of indemnity in the proper sense of the term. In one sense all the usual covenants in a deed may be termed covenants of indemnity; that is, they are designed to protect the purchaser to a certain extent against the failure of title, or an eviction, or against encumbrances; but they afford an indemnity in no other way than every other contract or agreement does—viz., by the right *to recover damages for its breach* or nonperformance, and this deed contains no other than the usual covenants" (p. 442).

So, in *Tuite vs. Miller*, 10 Ohio, 382, an attempt was made to compel a grantor to do an act in the *nature of specific performance*. But the Court held that the covenant of warranty was not a covenant of which specific performance could be enforced. The breach consisted in the existence of an outstanding dower right in the premises, and the grantee attempted to compel the grantor to satisfy the dower right, which had been converted into a rent charge because the premises were incapable of division.

LANE, C. J., said:

"There remains nothing but the covenant of warranty. The rule is universal, that no right of action arises under this covenant, except after an eviction or something which is equivalent. *But all the rights which the party is authorized to claim exist at law, and admit entire compensation in damages.* Whatever difficulties may be in the way of the plaintiff in seeking indemnity against this rent charge, *it seems to us that to extend the defendant's liability beyond that of responding in damages, after an eviction or its equivalent, would be to extend it beyond the settled terms of the covenant.* Bill dismissed."

See also *Wright vs. DeGraff*, 14 Mich., 164.

We have found no case which enlarges the operation of a covenant of warranty beyond its legal effect of an estoppel and as the basis of an action at law for damages.

(C) BUT EVEN IF THE DEED WERE A CONTRACT TO CONVEY, IT WOULD NOT AFFECT MRS. MOORE OR THE REAL ESTATE IN QUESTION TO WHICH SHE HOLDS THE TITLE.

The husband cannot convey his wife's land or even

compel her to release dower in his lands. The effect of a contract by the husband to compel the wife to convey her real estate, to release dower, &c., is considered in *Story Eq. Juris.*, § 731, *et seq.*, and cases there cited. The reasoning of the learned writer and the authorities cited assume as an established principle of law that a married woman cannot be compelled to part with the title in fee simple to real estate by any act or contract of her husband. The rules of law are clear on this point. Formerly it was necessary to examine the wife apart from her husband in order to ascertain if she freely consented even to release dower in her *husband's* land. Much more was her free consent necessary to the alienation of *her own* land. The development of the law, moreover, has been wholly in the direction of giving the wife absolute control of her own land.

A specific performance of a contract entered into by the husband will not be compelled of the wife.

2 *Story's Eq. Juris.*, § 731, *et seq.*
Outram vs. Round, 4 Vin. Abr., 203.
Emery vs. Wase, 8 Ves., 515, 516.
Weed vs. Terry, 2 Doug. (Mich.), 344.

In the last case the contract was enforceable against the husband.

(D) THE PLAINTIFFS, AS HEIRS AT LAW OF MONROE, IN WHICH CAPACITY THEY HERE SUE, HAVE NO RIGHTS UNDER THE DEED FROM MOORE, EVEN AGAINST MOORE HIMSELF.

This is true whether (*a*) the deed be regarded merely as a *deed*, as it must be regarded, or (*b*) as a *contract to convey*.

(a) *If the deed be regarded as a deed.*

The covenant of warranty is a personal covenant which runs with the land. *But it runs with the land only until breach.* Upon breach a right of action arises which is a personal right of the grantee, and passes, *not to the heir, but to the executor.*

"There was this important difference between warranty and the covenants which superseded it. The former was, in the strict sense of the word, a covenant real, and its benefit descended upon the heir in every instance, whether it had or had not been broken in the lifetime of the ancestor. It was a right to which an executor could never succeed. But with respect to covenants, although until breach, they, equally with the warranty, passed to the heir with the land they were intended to protect, yet *if a breach had occurred in the lifetime of the testator, they then became choses in action, incapable of transmission or descent, and whose right survived to the executor alone.*"

Rowle on Covenants, p. 335.

In order that any one except the covenantee in the deed may have the benefit of the covenant that one must have been seized of the land, *i. e.*, possessed of the land claiming it as his property.

"To support an action by an assignee on the covenant of warranty, it is necessary that the warrantor should have been seized of the land; for by a conveyance without such seizin the grantee acquires no estate and has no power to transfer to a subsequent purchaser the covenants in his deed, because, *as no estate passes, there is no land to which the covenant can attach.*"

Slater vs. Rawson, 1 Metc. (Mass.), 456.

(Same case in *100 Mass.*, where the only question was as to the seizin.)

See also

Beddoe's Exr. vs. Wadsworth, 21 Wend., 121.
Rawle on Covenants, p. 382 et seq.

The covenant "would not go to the *heir* by death for

the same reason that it could no longer follow the land into the hands of a devisee or grantee."

Beddoe's Exr. vs. Wadsworth, supra, at p. 123.

"But the right of the heir or devisee to take advantage of these last-named covenants (for quiet enjoyment and warranty), depends entirely upon whether their breach did or did not occur in the lifetime of the ancestor or testator."

Rawle on Covenants, 3d Ed., p. 608.

Moore never had any title to or possession of the land, but the land was in possession of a third party who held by a superior title. The covenant of warranty, therefore, was broken as soon as made.

Duvall vs. Craig, 2 Wheaton, 45, 61, 62.
Rawle on Covenants, 3d Ed., pp. 254, 255, and cases there cited.

The covenant was, then, broken in the lifetime of the ancestor, Monroe; and upon his death the right of action upon the covenant for damages, a personal right, went to his executor, and not to his heir.

The case against Moore is not aided by an estoppel; for an estoppel against Moore has no effect, because no title ever vested in Moore. While as against Mrs. Moore, the heirs of Monroe have no rights, because she made no covenant of warranty, and is not estopped by Moore's covenant.

(b) If the deed be regarded as a contract to convey.

Though in case there is a valid contract binding on the *vendee*, the *heir* is entitled to a *conveyance* from the vendor, yet, *if the vendor had no title*, or if for any other reason the *vendee was not bound by the contract at the time of his death*, the *heir* is not entitled to a *conveyance*, but the *executor* is entitled to *damages* for the

breach. Though the vendee *himself* had an option to take a conveyance of such title as the vendor could give, yet, upon the death of the vendee, such option ceased. The uncertainty then became a certainty. The reason was that the rights of the vendee went upon his death to different persons, *i. e.*, his real rights to his heir and his personal rights to his executor. A court of equity could not take from one to give to the other. Hence arose this settled rule; if there was a valid contract for the purchase of land binding upon the *vendee* at the time of his death, the heir of the vendee had the right to compel specific performance, and, if the purchase money was unpaid, to compel the executor to pay it out of the personal estate; but, if the contract for the purchase of land was *not binding* upon the vendee at the time of his death, either because the vendee had no title, or for any other reason, then the *heir* could claim nothing, but the right of action for damages for breach of the contract went to the *executor*. To have held otherwise would either have subjected the vendor to two actions, one for specific performance by the heir, and another by the executor for breach of the same contract, or would have deprived the executor of the right of action for damages, either of which results would be contrary to well-established principles.

The cases on this point are decisive.

Thus, the Master of the Rolls (Sir William Grant) said:

"The object of this bill, filed by the co-heirs of the purchaser, is to have the contract carried into execution. The vendor submits to perform the contract. The executors do not object to it. But the residuary legatee contends that there is no contract this Court

ought to execute; neither a contract in writing, nor part performed. It is insisted by the plaintiff that the residuary legatee has no right to object to the performance of a contract, to which the testator himself had no objection. *I am of opinion the Court cannot speculate upon what the deceased would or would not have done; but the inquiry must be, whether at his death a contract existed, by which he was bound and which he could be compelled to perform. That alone can give the heir a right to call for the personal estate to be applied, or to the personal representative a right to call upon the heir.* Whether the executor would or would not perform it, is of no moment. A mere executor has no right to give away the personal estate from the residuary legatee, who in this case is before the Court, and undertakes to show the plaintiff has no right to call for a performance of the contract."

Buckmaster vs. Harrop, 7 Ves., Jun., 341, 344.

In the same case upon appeal, the Lord Chancellor (ERSKINE), while fully recognizing the doctrine of the Court, that what is agreed to be done shall be considered as done, held that whether the heir is entitled to specific performance depends on whether the purchaser was bound at the time of his death.

"I agree with the Master of the Rolls, that *the question is, whether at the death of Finney* (the purchaser) *a contract existed by which he was legally bound*, and which, if he had refused, this Court would have compelled him specifically to execute. This constitutes the right of his heir to call for a completion of the contract; upon the rule that *what is agreed to be done shall be considered as done;* that money under contract to be laid out in land shall be considered as land; that land under contract to be sold shall be considered as money, each assuming the character imposed upon it by the contract; *but in either case a contract, according to the rules of law, must exist.*"

Buckmaster vs. Harrop, 13 Ves., Jr., 456, 471.

So by Lord ELDON :

"As between the heir and the personal representatives, *Lacon vs. Mertins*, 3 Atk., 1, *Buckmaster vs. Harrop*, 7 Ves., Jr., 341, and other cases, establish the general principle that whatever is the state of liability of the party himself to take at his death must be the state of liability, to be considered upon questions between those representing him after his death; and, *if at his death he could not be compelled to take*, clearly the heir could not say to the executor, "I will have the estate, and you shall pay for it."

Lord Chancellor ELDON in *Broome vs. Monck*, 10 Vesey, Jr., 597, 607.

"But where the contract could not have been enforced by or against the party who entered into the same, his heir cannot insist on having the estate, nor, of course, can the personal representatives be called upon to pay for it; the liability and the claims of the two classes of representatives, in respect of a contract, must be regulated by the rights and the liability of the party who made that contract, looking at the question as it stood at his death."

Note 5 to Seton vs. Slade, 7 Vesey, Jr., 265.

So the same doctrine is stated by the text writers.

"The heir or devisee has no right to insist on the completion of a purchase, except where the contract is such as might have been enforced against his ancestor or testator; for otherwise he would be able to take the purchase money from the personal estate, in order to purchase for himself that which his ancestor was not bound to purchase, and perhaps never would have purchased."

Fry on Specific Performance, 3d Am. Ed., § 196.

IT IS NOT AN ANSWER TO THIS ARGUMENT TO SAY that the contest is *not* between the heir and the executor, but between the heir and the vendor. For if there had been a valid contract to sell or convey, and that contract was broken by reason of the vendor not having

the title, and not being able to perform his part of the contract, then the right of action for damages for the breach descended to the executor. And that right of action no court can take away from the executor and give to the heir. *The vendor then is liable in one action to the executor; and if a suit for specific performance were allowed, it would be another suit for the same cause of action.* Here would be a clear case of interpleader if it were at all doubtful as to which of the two had the right of action, whether the heir or the executor. But that question is not doubtful. The fixed rule of the Court as to which of the two has the right is, that it depends, as we have above shown, upon whether the breach on the part of the vendor and warrantor occurred in the lifetime of the ancestor, so that the vendee was at the time of his death not bound to perform the contract. If the breach did so occur, then the executor had the right of action for damages and the heir had nothing.

THE HEIR OF THE VENDEE CANNOT, AS IS ATTEMPTED IN THE PRESENT SUIT, SAY HE WILL HAVE THE ESTATE, AND HIMSELF PAY THE PURCHASE MONEY. The vendor made no contract with the *heir*. The contract was with the *ancestor*, and it is only on the ground of the contract with the *ancestor* that the heir can have any right. The heir cannot, by *offering* to pay the consideration, force a contract with *himself* upon the vendor. If the contract with the ancestor, by reason of the failure of title, was not binding upon him at the time of his death so that he could not have been compelled to perform his part, then no one is bound to pay the *consideration* which was due from him. The heir is not bound, for the liability for debts of the ancestor does not descend

upon the *heir*, but upon the *executor*. The executor is not bound, because there was not a binding contract at the time of the ancestor's death (see cases *supra*). There was no one upon whom the vendor could call for the payment of the purchase money if *he* had sought to enforce the payment and the other party had refused. The contract has lost its mutuality by the death of Monroe, and mutuality is a requisite to specific enforcement.

To TEST THE QUESTION ON THIS POINT let us suppose that after Monroe's death Moore had acquired the title and (as is necessary in order that this argument have any force) that the deed to Monroe was not a deed, but a contract to convey, and that the land instead of having increased in value beyond the amount of the consideration money had decreased in value and had proved, as the indications were that it would prove, worthless. Suppose that under these circumstances *Moore* had sought to enforce payment of the consideration. Could *he* have done so? Clearly not; not in the lifetime of the ancestor, Monroe, for he had a perfect defense—failure of title—a defense which applied equally as to the note, for it was a defense open as between the parties to the note, and as to the remaining $10 of the consideration; not after Monroe's death, for the executor had a perfect defense that the ancestor was not bound at the time of his death, and the heir of course had the same defense, and a further defense that he was not liable for his ancestor's debts. The Court below is therefore radically wrong on the material, radical point that Moore could have collected the note (*Record, p. 141*).

Unless some one representing the ancestor was *bound*

to perform the contract on his part, if Moore had been able to perform and offered to perform on his part, the heir has no right to specific enforcement even as against Moore. By what right can a court decree specific performance of a contract upon the mere offer to perform the consideration unless the contractor or some one representing him was *bound* to perform the consideration and could have been compelled by the defendant to perform it? Can a plaintiff enforce specific performance if such performance is *advantageous* to him, when neither he nor any one else on his behalf is *bound* to perform it if it would be *disadvantageous*, and the other party was the one who sought performance?

It is elementary and fundamental in the doctrine of Specific Performance that this cannot be done.

But if I am wrong in all the foregoing propositions another bar or answer to the bill remains to be stated, viz., *that the contract of sale between Moore and Monroe was rescinded and abandoned.*

V.

The rescission and abandonment of the contract of sale by Moore and Monroe are clearly established and constitute, in any view of the case, a complete answer to the bill.

I shall first consider the evidence by which the rescission and abandonment of the contract are established, and then state the principles of law and the

authorities which show that such rescission and abandonment have deprived complainants of any equity to have the supposed contract specifically enforced, if they would otherwise have had such an equity.

If it is competent for the Court to treat the deed from Moore to Monroe not as a deed, but as in equity a contract to procure a title or to convey an after acquired title, which I have denied (*ante*, pp. 82–88), then this, like any other contract, may be rescinded or abandoned.

I. THE EVIDENCE AS TO THE RESCISSION AND ABANDONMENT OF THE CONTRACT:

The facts as to the rescission or abandonment of the contract of sale were stated by Moore (the only witness who makes a connected statement on the subject) as follows (Record, fol. 61, p. 37):

"In '76, in August or September * * * Mr. Monroe came to me—he told me he wanted me to pay him the money that he had given me to enter that land (the school section). I told him I didn't have any money; that Mr. McDonald was keeping back my wages for money that I owed him, but just as soon as I could possibly pay him I would do so, and if he would be willing to take it in installments I would pay it as fast as I could, and he told me that he knew I had no deed to the land and knew that I would never get a deed (*i. e.*), to the land in sixteen" (which is the land in suit). "He says, 'I don't want the land. I don't think it is of any account, anyway.' He told me then that he had been talking with Mr. McDonald and Mr. McDonald told him he wasn't sure whether I would ever have a deed of it. I told him that the note which he gave me was in possession of Mr. or Mrs. McKay. He says, 'I know that. I can get the note from them, and I will send you your deed back. I haven't had it recorded.' I told him that was all right. He waited

until six o'clock, until I got through with my work. We went into Negaunee. We went into Mr. Schadt's. He said, 'I gave you one hundred and fifty dollars to enter the lands, and ten dollars on the other land,' and he said, 'if you give me your note for one hundred and sixty dollars I won't charge you any interest for the time you have had the money. I done so. * * * I told him if he could get the note it was all right."

This is the story of the rescission as given by Moore. An objection, however, was made to the admission of Moore's testimony on the ground that at the time of the trial Monroe was dead, and, therefore, Moore was rendered incapable of testifying to a conversation had with Monroe in regard to a matter affecting Monroe's interests. Under the Federal Statutes (Rev. Stats., Section 858) such testimony is competent, and so the Court below held (Rec., p. 139, fol. 221).

We do not, however, need to rely on the testimony of Moore to establish a rescission or abandonment of the contract of sale by Moore and Monroe. All that is material in Moore's testimony is confirmed by the testimony of disinterested witnesses whose credibility is not open to doubt or suspicion, and by undisputed facts and the conduct of both parties, which are inconsistent with any theory, except that Moore told the truth, and that the contract was rescinded and abandoned by both Moore and Monroe.

It is worthy of remark, in connection with this subject of the rescission of the contract, and of the credibility of Moore's testimony, that in regard to all the facts that preceded the rescission Moore's testimony was fully supported by the testimony of McDonald and McKay, who were parties to the transaction, and by the documents which were produced in

evidence. This statement is true in regard to the alleged oral understanding between McDonald and McKay on one side and Moore on the other, and all the circumstances connected therewith; also, in regard to the fact that McDonald and McKay never gave Moore a deed, and that the reason for not giving a deed was that Moore owed McDonald.

All that is material in the transactions between Moore and Monroe, both in the contract of sale of one-half of Moore's prospective interest in the land, and in the rescission or abandonment of that contract is confirmed and established without the aid of Moore's testimony.

The Court below (Rec., pp. 139–141) overlooked the foregoing facts, viz., that the rescission and abandonment were clearly established *aliunde* Moore's testimony on that subject, and seems to have labored under the mistaken notion that the defendant's case on this point rested wholly or essentially on Moore's verbal testimony as to personal conversations and transactions with Monroe.

The Court's observations upon Mr. Moore's testimony and conduct based upon a mistake of dates and facts are quite unjust, as well as the conclusion that his testimony as to the rescission should be "rejected" (p. 141, fol. 224).

But even if rejected the facts of rescission and abandonment are fully established by disinterested testimony and by the higher evidence of the acts and conduct of the parties.

Mrs. Monroe testified to the payment to Moore of the $10 at the time of the sale to Monroe of the land in question (Record, pp. 66, 67, fol. 105), and that the $10 was paid towards the purchase price of the land (Record,

p. 68, fol. 107), thus fully confirming the testimony of Moore in respect to that payment. The execution of the deed and the amount of the consideration for the deed are undisputed facts and correspond exactly with Moore's testimony (see the deed, Record, p. 17, fol. 31).

Besides the $10 which was paid on account of the land, as Mrs. Monroe (now Crawford) testified, there was a note given for $240, the remainder of the purchase money. That there was such a note is a fact beyond dispute. Mrs. Monroe produced it and put it in evidence (Testimony of Mrs. Crawford, Record, p. 61, fol. 98, where copy of note is given). That this note was given by Monroe to Moore in part payment for the land is also a fact not disputed. Even Mrs. Crawford had so stated to Jane McKay (Record, p. 20, fol. 30; p. 22, fol. 38). William McKay had also so stated to John McKay when the note was left with John McKay and his wife (Record, p. 23, fol. 40). There is also a strong probability arising from the fact that the amount of the note corresponds exactly with the amount due on the land in addition to the $10, to the payment of which Mrs. Crawford testified.

The $240 note was never paid. No one pretends that it was ever paid. The Court below found that it was not paid, and going outside of any tender or offer in this bill provided for its payment out of the rents and profits of the land (Record, Opinion, p. 142; Decree, p. 143).

There is not the slightest evidence that it was eve paid or that there was any offer of payment. It certainly had not been paid at the time when William McKay was, as he testified (see *infra*), trying to raise money on it for Moore. The conversation between

Mrs. Monroe and the McKays at the time the note was obtained by her is meaningless if the note had been paid. Even Mrs. Monroe's testimony in regard to the possibility of William McKay calling for the note is utterly inconsistent with any idea on her part that the note had been paid (Record, p. 62, fol. 99; p. 69, fol. 108). The Court below, moreover, as above stated, found that the $240 note was given in part payment of the purchase money; that the note had never been paid, and in the decree made provision that the amount be allowed as a credit (Record, p. 142, fol. 226).

The $240 note was put by Moore into the hands of William McKay in order to enable him to raise money on it for Moore from Daniel or Archibald McIntyre (Testimony of William McKay, Record, p. 92, fol. 134).

This testimony of William McKay corresponds exactly with the testimony given by Moore ten months before William McKay's deposition was taken (See testimony of Moore, Record, p. 43, fols. 69-70). The $240 note was left by William McKay with John McKay and Jane McKay (Testimony of William McKay, Record, p. 92, fol. 135; of Jane McKay, p. 20, fol. 35; of John McKay, p. 23, fol. 40).

MRS. MONROE (CRAWFORD) OBTAINED THE NOTE *from the McKays* (Testimony of Mrs. Crawford, Record, p. 62, fol. 99; of Jane McKay, p. 20, fol. 36; of John McKay, p. 23, fol. 41).

She obtained it AT THE REQUEST OF MONROE, *who sent her for that purpose.* Mrs. Monroe so said when she asked for and obtained the note. (Testimony of Jane McKay, Record, p. 20, fol. 35; of John McKay, p. 22, fol. 41). This is part of the *res gestæ* of the obtaining of the note by her, and as such is competent testi-

mony. In addition to these statements made by Mrs. Monroe at the time, *Monroe's conduct when his wife on her return home showed him the note is consistent only with the fact that he had sent her for the note and understood the whole transaction.* Upon no theory inconsistent with this fact can Monroe's conduct be explained. Here was a man in moderate circumstances, a blacksmith, as appears from the testimony of McDonald (Record, p. 34, fol. 56), to whom *a $240 note was not an item of so little importance as to cause no other comment than "put it by,"* as testified by his wife (Record, p. 69, fol. 108), UNLESS MONROE KNEW HOW AND WHY THE NOTE CAME INTO HIS WIFE'S POSSESSION. Here was a man who, as the testimony shows, and as the Court below finds, owed $240 on this very note. The note is obtained from its custodians, and brought to him by his wife, and he says nothing but "put it by." Suppose, for the sake of the argument, that Mrs. Crawford's testimony be true, that Monroe did not request her to obtain the note, what follows? Why, that *Mrs. Monroe obtained the note*, notified her husband of the fact, and doubtless of her statements and representations when she obtained it, and now on the present theory of the plaintiffs they *kept it* DISHONESTLY, *well knowing that it was a note which Monroe ought to pay, and that they had no right to the note until it was paid.* Mrs. Monroe knew this fact, for she testifies that Jane McKay told her that "*it was for us to pay money*" (Record, p. 63, fol. 100). Monroe knew it, for he was the maker of the note and the man who owed the money. *Notwithstanding this knowledge,* THEY KEPT THE NOTE FOR NINE YEARS, from the summer of 1876 until it was produced by Mrs. Monroe in

evidence in this suit, July 23, 1885 (Record, p. 62, fol. 99), AND NEVER PAID, OR OFFERED TO PAY, A SINGLE CENT UPON IT. THEY DO NOT CLAIM THAT THE PAYMENT OF THE NOTE WAS EVER DEMANDED OF THEM BY MOORE OR ANY ONE FOR HIM, AND SUCH PAYMENT WAS IN FACT NEVER DEMANDED. THEY DO NOT EVEN OFFER TO PAY IT IN THE BILL.

AND THESE ARE THE PARTIES WHO COME INTO A COURT OF EQUITY, AND ASK THE COURT TO DECREE A CONVEYANCE OF THE LAND FOR WHICH THAT RETURNED AND UNPAID NOTE WAS TO HAVE BEEN PAYMENT ! ! !

Is this equity ? And is it in a court of equity where such things are asked and decreed ?

THAT THE RESCISSION IS TRUE is further confirmed by the facts in regard to the $160 note. That there was such a note is clear from the testimony of Mrs. Crawford (Record, p. 68, fol. 106), and of John McKay (Record, p. 24, fol. 42). This note was paid in the manner testified to by Moore. The larger part of this note was paid to Monroe in his lifetime. Mrs. Crawford testified that Moore had paid some money to Hansen (now dead), the Justice, in whose hands the note was placed for collection (Record, p. 73, fol. 113), and that the amount remaining due on the note was paid to herself (Record, p. 68, fol. 106; p. 72, fol. 112). This final payment to Mrs. Crawford had been made by the summer of 1881 (Testimony of Jane McKay, Record, p. 20, fol. 36; of John McKay, p. 24, fol. 42), and *not*, as the Court below erroneously states (and on that erroneous belief most unjustly criticises Moore's conduct) in 1883 or 1882 (Record, p. 140, fol. 223).

If the rescission were not true, then the conduct of Moore, and of Monroe, and even of Mrs. Monroe, in regard to the payment of the $160 note, was strange and inexplicable. Monroe constantly urged Moore to pay up the $160 note (which Moore was unable to do for some time because of his other debts); *whereas, if there had been no rescission, Monroe owed Moore,* and *not* Moore, Monroe. Monroe even went to McDonald and tried to collect the $160 note out of Moore's wages, when Moore was in McDonald's employ, or to sell the note to McDonald (Testimony of McDonald, Record, p. 30, fol. 51); *whereas,* if the rescission were not true, Moore's debt on the $160 note was more than fully secured by the $240 note which Monroe owed to Moore. If the rescission were not true, then at the very time when the note was placed in the hands of the Justice, Hansen, for collection, Monroe owed Moore, and not Moore, Monroe. There is the further fact that when Moore paid Mrs. Crawford the amount which remained due on the $160 note, neither of them mentioned either the $240 note or the alleged interest of Monroe in the land (Testimony of Mrs. Crawford, Record, p. 72, fol. 112; p. 68, fol. 107). There is, moreover, not the slightest evidence that Moore, even when he was heavily in debt, and when the land was, as the testimony fully establishes, deemed to be of no more value than when Moore sold one-half of his prospective interest to Monroe, ever claimed the $240 note or demanded its payment, or that Monroe when he was trying to collect the $160 note ever mentioned the $240 note, or in any way recognized it as a subsisting obligation.

It is not an answer to this argument to say that

Moore had no title and therefore was not in a position to ask for the payment of the $240 note. For it could not have been contemplated by Moore and Monroe that the latter was not to pay the money until Moore obtained a title, much less, until the land proved very valuable. The date for the payment of the money was fixed in the note, without reference to any acquisition of title by Moore. The bargain was a speculative one, and Monroe could not be suffered to lie by and see how it turned out before offering to perform his part. Such a thing is never allowed by a court of equity (see cases, *infra*).

THAT MONROE WANTED *to rescind the contract*, and the *reasons* why he wanted to rescind it are facts established without the aid of Moore's testimony.

Jane McKay testified (Record, p. 20, fol. 35), that in the summer of 1876, when Mrs. Monroe came to her house to get the note:

"She said *Mr. Monroe wanted her to come and get the note;* that she hadn't time to do it. She said Mr. McKay had informed them *that Mr. Moore had no claim to the land.* She said *that it was worthless*, anyway. * * * She said *that Mr. Moore had no title to the land and Mr. Monroe wanted his note.* She said the note was given in payment for this piece of land, that Moore had given a deed for."

John McKay testified (Record, p. 23, fol. 40), "Monroe wrote to me inquiring whether Moore had an interest in the land; this must have been in 1875 or in the fore part of 1876, to the best of my recollection. * * * I answered by letter *that Mr. Moore had no claim in the property; that McDonald and I owned it; that Moore hadn't got any deed of it.*" He testified, also (Record, p. 23, fol. 41), that when Mrs. Monroe came to get the note, "*She said her husband had sent her up after the note he had given* Mr. Moore. * * * She said Mr. Moore had given him a deed of this piece of *land he had no claim to, and that*

it was worthless and she wanted the note. "McDonald testified (Record, p. 30, fol. 51), that in the summer of 1876 "Monroe *told me that he didn't care about the land, and if he could get his money out of Moore he didn't want the land; it wasn't worth a cent anyway; he wouldn't have it.*"

Monroe knew, too, that Moore was NOT LIKELY TO GET ANY TITLE, because he was almost hopelessly in debt to McDonald. The latter testified (Record, p. 15, fol. 28):

"*He* (Moore) *always owed me*, you know, and *I was always loaning him money*, and when I wrote out this deed (the Viele deed) and left it with McKay, or whoever I left it with, *I told McKay never to sign that deed until I was made right with Moore.*"

Monroe knew of this indebtedness, and that Moore would not get any title until and unless it was paid. McDonald testified (Record, p. 30, fol. 51):

"He asked me if Moore had an interest in it; I told him he would have when he paid me; he didn't have any interest in it yet."

Jane McKay also testified (Record, p. 22, fol. 38), that she told Mrs. Monroe that "there was business unsettled between Mr. Moore and Mr. McKay, and *she* never would sign the deed unless it was settled."

THAT THE CONTRACT WAS COMPLETELY ABANDONED BY MONROE and his representatives is further shown by the fact that neither he nor they made any pretense of owning an interest in the land from the time of the return of the unpaid $240 note in the summer of 1876 until the summer of 1881; nor were any active measures taken to enforce their newly pretended claim until February, 1882, when this suit was instituted. *During*

all this time, it must be remembered, *neither Monroe nor his representatives had performed, or shown any willingness to perform, his part of the contract; but, on the contrary, they had obtained and kept, and had never paid, or offered to pay, the $240 note*, the payment of which was to constitute *twenty-four twenty-fifths of the consideration for the land*, and according to the testimony of Moore, the $10 of the consideration which had been paid was returned in the $160 note. A more complete abandonment of a contract, and failure to perform on the part of the purchaser, could hardly exist in any case. It is clear that no claim would ever have been made, if the land had not shown *indications* of greater value just before such claim was made, while its greater value was *known* in a month or two after this suit was brought, if not at the time when it was brought. All these facts, it is to be noticed, are fully established *without the aid of Moore's testimony.*

THE CONTRACT WAS A SPECULATIVE ONE. Monroe who did nothing under it, became tired of it, and abandoned it. But if the complainants insist that there was no formal rescission, they are confronted with the other horn of the dilemma,—*they lay by, and have never yet performed, or showed themselves ready, willing and eager to perform*, nor did they seek performance from Moore *until the land had greatly increased in value.* They sought to obtain the advantage whichever direction the speculation turned; *so long as the contract had turned out unfavorably, they showed no indications of desiring to go on with it*, but, on the contrary, repeat-

edly said, they "did not want the land;" but *as soon as matters look a favorable turn, they began to look about them, not, however, even then, to perform on their part, but to try to get the land,* or as Mrs. Crawford expressed it to John McKay (Record, p. 25, fol. 43), "*to beat Moore out of it.*"

JOHN MCKAY, whose wife was a sister of Mrs. Monroe, who himself had an interest in the same land, and who would have been likely to know whether or not Monroe or his representatives had made any claim to the land, testified (Record, p. 24, fol. 42):

"WE BOUGHT IT ON SPECULATION; understood from Moore it was on an iron range, and thought we might find ore in it and make a little money out of it. *After looking up the lines this outcrop was found to be on section 15* (the next section, and not the land in suit). *No good ore was known to be on it until the Cambria Company went in to explore.* I think this will be four years next May (*i. e.*, in May, 1881). UP TO THAT TIME WE HAD NO KNOWLEDGE OF ANY PARTICULAR VALUE TO IT. We thought it might turn out all right on account of being in the iron range." To the question, "When was it sufficiently explored to show that it had large value for iron ore?" he answered: "This was in March or April, 1882, as near as I recollect. This became known by the explorations of the Cambria Iron Company to which we had given an option on it. About five years ago (*i. e.*, in 1880) *McDonald offered me a third interest in it for $500* (which is at just the same rate as that mentioned in the deed from Moore to Monroe). Mrs. Monroe showed me her husband's deed from Moore when she was at my place three years ago—three years ago last summer (*i. e.*, in 1881), as near as I remember; she claimed she had a deed for the property and thought she could get it. THAT IS THE FIRST I KNEW OF HER CLAIMING ANY INTEREST IN THE PROPERTY SINCE THE NOTE WAS GIVEN UP TO HER. THE CAMBRIA COMPANY WAS THEN EXPLORING, AND IT WAS REPORTED THEY HAD STRUCK SOME ORE, BUT IT WAS NOT KNOWN WHAT IT AMOUNTED TO. WE EXPECTED THEY WOULD STRIKE ORE AND BEGAN TO THINK THE PROPERTY WORTH SOMETHING." * * * "At

this last conversation with Mrs. Crawford she wanted me to look it up and see if I could get the interest for her. I didn't say much at that time. She allowed if I would get her that interest she would make it all right with me. Then she went home to Canada. She wrote me once or twice and wanted I should look the matter up for her, so at last *I wrote to her that I thought she had no right to the property because she had got the note back*, but at the same time she might employ an attorney and look it up if she wished. She said nothing more about it until after her marriage to Crawford (which was in the fall of 1881, see testimony of Mrs. Crawford, Record, p. 65, fol. 103), when they both came to my house in Hancock. She said Mr. Moore was giving her a bad deal on that land interest of hers. I asked her how that was, and she allowed he wouldn't give it to her, so I told her I didn't consider she had any right to it, as I wrote before; *that she had got her note back, and I didn't consider she had any right to it at all. She admitted getting the note back* and said that Mr. Moore had plenty of property without this piece and IT WOULD SERVE HIM RIGHT TO GET BEAT OUT OF IT."

Mrs. Crawford admits that she had the conversation with John McKay, but does not agree with McKay as to what was said (Record, p. 63, fols. 100, 101). Her testimony, however, is manifestly unreliable, and the Court below so regarded it (Record, p. 141, fol. 224).

When, however, she makes admissions or statements against her interest we have the right to the benefit thereof).

In regard to the change in the value of the land, McDonald also, who had an interest in the land and knew whereof he spoke, testified (Record, p. 31, fol. 53). "*I never knew it was of any value until we let the option to the Cambria Mining Company.* * * * *That must have been in 1881.*" To the question, "about what time was it that they first developed mineral value there, that is, to show that there was mineral value there?" he replied: "Well, in the spring; I couldn't say what time that was, but it must have been in the following spring."

THE UNDISPUTED FACTS AS TO RESCISSION AND ABANDONMENT COMPLETELY NEGATIVE THE FRAUD ON WHICH THE DECREE IS FOUNDED.

The taking of the title to the land in Mrs. Moore's name, December 16, 1880 (*Record, p.* 78), when examined in the light of the rescission, or abandonment of the contract, was not, as complainants allege (*Record, p. 10, fol. 20*), "with the intent of *defrauding* these complainants."

In 1876 Mrs. Monroe obtained the possession of the purchase money note for $240, which her husband had given to Moore; she informed her husband thereof and he ratified what she had done and told her "to put it by." In 1877 Moore settled with McDonald and McKay. December 16, 1880, McDonald and McKay conveyed one-third interest in the land to Mrs. Moore (Record, p. 78). The circumstances under which this was done do not very definitely appear, but in the argument which follows, I will concede, for the argument, that this was done at Moore's request, and will show that under the circumstances this was not only not a fraud upon any legal or equitable rights of Monroe or his heirs, but was on Moore's part a perfectly legitimate thing to do. It is none the less legitimate even if I should concede that the title was thus taken for the purpose of preventing the Monroes from obtaining the apparent title to land, the contract for which had been abandoned, and for which they had never paid or offered to pay or desired to pay.

Monroe and his representatives had wholly neglected to perform his part of the contract, and had treated it as abandoned, and hence they have no reason to com-

plain if Moore also treated the contract in the same manner.

TWO FACTS *stand out prominently to establish Moore's honesty* in consenting or, if you please, directing, the title to be taken in his wife's name (1); that at the time when the conveyance was made to Mrs. Moore (*December 16, 1880, see abstract of title, Record, p. 78, fol. 118 a*), the land had no greater value, nor was it supposed by its owners to have any greater value than when Moore gave the deed to Monroe (*see testimony of John McKay, Record, p. 24, fol. 42; testimony of McDonald, Record, p. 30, fol. 51; p. 31, fol. 53*).

MCKAY testifies (*Record, p. 24, fol. 42*) that about five years ago (*i. e.*, in 1880), *the very year when the deed was made to Mrs. Moore, McDonald offered to sell his* ONE-THIRD *interest in the same land for $500.*

MCDONALD also testified (*Record, p. 30, fol. 51*) *that he had offered to sell to McKay for $500.* And both of them testified, as we have seen (*supra*, p. 110, 111), that *there was no change in the value of the land till May, 1881.*

(2) That from the summer of 1876 up to the time of the conveyance to Mrs. Monroe (December 16, 1880), no claim to the land had ever been made by Monroe or his representatives (*supra*, p. 110), nor was such claim made until the summer of 1881.

How, then, could Moore be charged with dishonesty in requesting McDonald and McKay to convey to Mrs. Moore? Monroe had not paid for the land, and the land was worth no more at the time of that conveyance than it was when the deed was made to Monroe. A third interest in the same land was in that same year offered for sale at just twice the purchase price, which

was to have been paid by Monroe for the one-sixth interest. Neither Monroe nor his representatives had ever showed that they wanted the land, or were willing to pay for it; but on the contrary, all parties had treated the contract as abandoned.

II. THE PRINCIPLES OF LAW APPLICABLE TO THE RESCISSION AND ABANDONMENT OF THE CONTRACT.

The deed from Moore to Monroe was inoperative as a deed, for Moore had no title. And it could not operate by estoppel, for Moore never afterwards acquired a title. The only remedy for Monroe was upon the covenants in the deed. But those covenants, as we have shown, *supra*, gave only the right of action for damages if they were broken, and were not in any sense executory contracts to convey. The Court below, however, stated (*Record, p. 138, fol. 218*) that:

> "A deed of conveyance, with covenant of seizin and of general warranty, of land to which the grantor has no title *is good in equity as a contract for a conveyance*, and title afterwards acquired by the grantor enures to the benefit of the grantee or his heirs."

To this proposition I reply, in addition to the argument, that a deed with covenant of warranty is *not* a contract to convey (*supra*, p. 82); that even if it were good "in equity as a contract to convey," as stated by the Court below, still *Monroe and his representatives have lost all equity to have the contract enforced.*

(*a*) By the *rescission* of such contract.

(*b*) By the *abandonment* of such contract, Monroe saying repeatedly that he "did not want the land," "*that he wouldn't have it.*"

(*c*) By the total *failure to perform*, or *even to offer* to perform, on the part of Monroe or of his representatives.

UNTIL,

(*d*) The subject matter had greatly *increased in value.*

AND UNTIL,

(*e*) The contract had become unenforceable *against Monroe or Monroe's representatives*, if the land had *fallen in value*, and *Moore* had sought specific performance.

These reasons are conclusive; and the proposition, that a court of equity will refuse to interfere to aid a party who comes under such circumstances to ask for specific performance of a contract, was fully sustained by this Court in *Brashier vs. Gratz*, 6 Wheaton, 528, 541.

Chief-Justice MARSHALL gave the opinion:

"This, then, is a demand for a specific performance, (1) *after a considerable lapse of time*; (2) *made by a person who has failed totally to perform his part of the contract*; (3) *and it is made after a great change, both in the title and in the value* of that which was the subject of the contract; (4) and *by a person who could not have been compelled to execute his part of it had the circumstances taken an unfavorable direction.*"

"In such a case we are of opinion that a court of equity ought to leave the parties to their remedy at law."

Brashier vs. Gratz, 6 Wheaton, 528, 541.

The Court below seemed to labor under the mistake that a *formal* rescission was necessary, and that such *formal* rescission could not be made out without Moore's testimony, which the Court rejected. I have shown, *supra*, that Moore's testimony was credible, that it was fully confirmed by disinterested witnesses and uncontroverted facts, and, therefore, ought not to have been rejected by the Court.

BUT IT IS NOT NECESSARY TO SHOW ANY FORMAL RESCISSION. It is sufficient to show that the contract was abandoned, that the conduct of the parties was such as to lead each other to believe that the contract was abandoned, and that they made statements and performed acts which were consistent only with an abandonment of the contract. Especially is this true of Monroe, who repeatedly said that "he did not want the land," who sent his wife to get the $240 note which he had given for the purchase money, which *note was kept by him and his representatives for nine years* and never paid or offered to be paid, while both Monroe and Mrs. Monroe received payment of money on the $160 note, whereas, if the contract was not abandoned they owed Moore the larger sum on the $240 note.

The case of *King vs. Morford*, in the Supreme Court of New Jersey, fully sustains the proposition that no *formal* rescission is necessary.

Jarrett Morford made a written contract to sell certain land to Joseph King. Morford afterwards conveyed the same land to John Pintard and Jonathan McLain, who had notice of the contract to sell to King. They were not, therefore, purchasers for value without

notice, and any equity which existed against Morford existed also against them. King brought suit against Morford and his grantees, Pintard and McLain, for specific performance of the contract to sell to him. One of the defenses, and the one on which the Court gave judgment for the defendant, was, that the plaintiff, King, *had abandoned the contract.* It was not regarded as an objection to this defense that there had been no formal rescission of the contract. The written document had neither been given up, nor had any new writing been made to destroy its effect. The evidence on which the Court supported the abandonment of the contract was that King had said, "*he did not want the property,* and that he would as lief or a little rather that witness should have it as *any other persons.*" (The italics are the Courts).

The Court said:

"After [the complainant] telling Morford he did not want the property; that Appleby might take it; that he would quite as soon, and perhaps rather he should have it than any other person; I do not see how he can call for a specific performance, though the sale was not to Appleby, but to some other person. Suppose the negotiation with Appleby had failed, can it be that it would have been necessary to consult Mr. King, as to any other disposition of the property? I think not."

"Whether or not a contract shall be ordered to be specifically performed by this Court is always a matter resting in sound discretion. 'The jurisdiction,' says LD. ELDON, in 12 *Ves.*, 331, is not 'compulsory upon the Court, but the subject of discretion. The question is not, what the Court must do, but what it may do under the circumstances.' If the claim for a deed is not just and reasonable; if a party has been grossly negligent of his rights, or has abandoned his contract, equity will not afford him extraordinary relief. The strict rule is this, that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law."

King vs. Morford, 1 N. J. Eq., 274.

See also

Dinn vs. Grant, 5 De G. & Sm., 451.
Love vs. Belk, 1 Ired. Eq. (No. Car.), 163.
Maxfield vs. Terry, 4 Del. Ch., 618.

The propositions stated above are fully supported by a case decided by Chancellor KENT, who in an elaborate opinion said:

"These were cases of delay on the part of the vendor, but the rule applies equally to both parties, and *the* PURCHASER *who neglects his part of the engagement will be left to his remedy at law* (if he has any), though he may have paid part of the purchase money. HE CANNOT BE SUFFERED TO LIE BY AND SPECULATE ON THE RISE OF THE ESTATE. The cases of *Spurrier vs. Hancock*, and of *Harrington vs. Wheeler*, 4 Vesey, 667, 686, were on bills filed by the purchaser for a specific performance, and in the latter case he had paid part of the purchase money; but the bill in each case was dismissed on account of his laches, and trifling and unreasonable delay."

"I shall cite," says Chancellor KENT, "only one more case, that of *Alley vs. Deschamps*, 13 Vesey, 224, which was a late decision by Lord ERSKINE, and which in all the circumstances of the case is very analogous to the one now before me. It was a bill in behalf of a purchaser for a specific performance; he was to pay by installments and was put into possession upon the execution of the agreement. He afterwards became embarrassed and unable to comply with the terms, though he had paid £100 in part satisfaction of the contract. The bill was filed before the last installment was due. The defendant in his answer said that the contract was considered by him as relinquished, and that the plaintiff was suffered to continue in possession as tenant. *The Lord Chancellor said he should take it that the agreement was not abandoned, and that the plaintiff did not by his own act consent to rescind it; but he said that* UNDER THE CIRCUMSTANCES OF THE CASE THERE WAS NOT A COLOUR FOR DECREEING A SPECIFIC PERFORMANCE; *and that his judgment proceeded upon a plain principle,* THAT A BILL FOR SPECIFIC PERFORMANCE WOULD NOT BE ENDURED UNDER SUCH CIRCUMSTANCES; THAT IT WOULD BE DANGEROUS TO PERMIT PARTIES TO LIE BY, WITH A VIEW TO SEE WHETHER THE CONTRACT WOULD PROVE A GAINING OR LOSING BARGAIN, AND ACCORDING TO THE EVENT, EITHER TO ABANDON IT, OR, CONSIDERING THE LAPSE OF TIME AS NOTHING, TO CLAIM A SPECIFIC PERFORMANCE; that here *nothing had been done*

except the one small payment towards performance when the purchaser became bankrupt, nor afterwards, UNTIL THE PREMISES, BY A SUBSEQUENT EVENT, PROVED TO BE MUCH MORE VALUABLE THAN THEY WERE AT THE TIME THE CONTRACT TOOK PLACE. The bill was dismissed with costs.

"It is impossible," said the Chancellor, "not to be struck with the close analogy between that and the case now under consideration," and we may add that the analogy to the present case is equally close.

"*Here the purchaser,*" continues the Chancellor, "*has paid nothing, but suffered defaults to accumulate year after year, as if he had forgotten that he was under any obligation to pay;* AND IF THE LAND HAD NOT RISEN IN VALUE WITHIN THE LAST TWO OR THREE YEARS, SO AS TO RENDER THE PURCHASES AN OBJECT OF SPECULATION, THERE IS NO REASON TO BELIEVE THAT THE PLAINTIFF WOULD EVER HAVE ATTEMPTED TO RAISE THE MONEY OUT OF THE BENEVOLENCE OF HIS FRIENDS. *I think, that, within the reason and spirit of all the cases, here was a gross negligence on the part of the plaintiff, that takes away his claim to assistance.*"

Benedict vs. Lynch, 1 Johns. Ch., 370, 378, 379.

The principle stated by Chancellor KENT, in *Benedict vs. Lynch, supra*, that "*a purchaser cannot be suffered to lie by and speculate on the rise of the estate,*" as plaintiffs in the present case have done, was fully supported by this Court in *Brashier vs. Gratz, supra.*

The same principle has received the sanction of the Supreme Court of Illinois, in the case of *Roby vs. Cossitt*, which case is in point in other respects also.

In the latter case the Court said:

"*But there is another view that is equally conclusive of the case.* The alleged contract was made February 15, 1867, and this bill was not filed until July 14, 1873. The contract price was $52,000, one-third to be paid within forty days and the balance in three equal annual payments, with eight per cent. interest. Only $500 were paid to Meserve at the date of the contract."

"Each installment of the purchase money had become due before this bill was filed. It is not claimed that the vendee, or any one for him, paid any but the first installment of the purchase money. It is charged that $52,000 was a fair price for the property at the time of making the contract, but that it had since risen to be of the value of $240,000 when this suit was commenced."

* * * * * *

"*In fact, he has done nothing to show readiness and willingness to perform the contract on his part*, nor that he had the ability to perform it. But a trifling sum was ever paid to the alleged agent, but *complainant asks to obtain the advantage of the immense rise in the value of the property without having himself performed or offered to perform the contract except in an unimportant part.*"

Roby vs. Cossitt, 78 Ill., 638, 643.

A delay of *only ten months*, during which the land contracted to be sold had materially *decreased* in value, was held fatal to a suit for specific performance by the vendor.

Jackson vs. Edwards, 22 Wend., 498.

See also

Lloyd vs. Collett, 4 Bro. Ch. R., 469.
Griffin vs. Cunningham, 19 Gratt., 571, 589–591.
Rogers vs. Saunders, 16 Maine, 99, 100.

A party who comes into a court of equity to ask for specific performance must show that *he has always been ready, willing and eager to perform the contract on his part.* From the effects of *unavoidable* and *reasonable* delay a court of equity will sometimes relieve, but from *voluntary, intentional* and *speculative* delay, *never.*

If the deed was, as plaintiffs contend, an executory contract *to obtain the title* and then to convey, why did not Monroe seek the performance of such contract away back in 1877? McDonald testifies (Record, p. 35, fol. 58) that Moore's indebtedness to him, which was the

obstacle to Moore's obtaining a title, and which *Monroe knew* was the obstacle (see testimony of McDonald, Record, p. 30, fol. 51), had been settled in 1877. If Monroe wanted the contract performed on the part of Moore, and was willing to perform on his part, why did he not show some such desire, then or later? If he wanted the contract performed he slept upon his supposed rights, and, therefore, neither he nor his heirs have any right, at this late day, to call for specific performance. But the testimony is conclusive that Monroe did *not* want the contract performed; he repeatedly said that "he did not want the land," and he showed no willingness to perform on his part.

Speaking of the effect of delay in the performance of a contract Mr. Justice STORY says:

"It is true that *courts of equity have regard to time*, so far as it respects the GOOD FAITH AND DILIGENCE of the parties. But if circumstances of a *reasonable* nature have disabled the party from a *strict* compliance, or if he comes, *recenti facto*, to ask for a specific performance, the suit is treated with indulgence, and generally with favor, by the Court. *But, then, in such cases, it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract;* that compensation for the delay can be fully and beneficially given; that he who asks a performance is in a condition to perform his own part of the contract; *and that he has shown himself ready, desirous, prompt and eager to perform the contract.*"

1 *Story Eq. Juris.*, § 776.

This principle has been recognized by the Supreme Court of Illinois.

"It has been repeatedly held by this Court that a party cannot call, *as of right*, upon a court of equity to exercise this branch of its jurisdiction; that its ex-

ercise rests in the sound discretion of the Court, in view of the terms of the contract of the parties and surrounding circumstances. *A party demanding its exercise is bound to show he himself has always been ready, willing and eager to perform on his part*, when the contract itself does not make time of the essence of the contract. In cases where time is of the essence it has been the constant ruling of this Court that such a provision cannot be dispensed with, but will be enforced, except under very peculiar circumstances."

Phelps vs. S. I. R. R. Co., 63 Ill., 468, 469.

THE CONTRACT *has lost its mutuality.* Though mutuality of remedy generally has reference to the time when the contract is made, yet if one party delays to perform on his part until circumstances take a favorable turn for him, and by that time the other party has by the delay lost the right to enforce the contract if circumstance had taken an unfavorable turn. In such a case a court of equity will not interfere.

See *Brashier vs. Gratz, supra.*

Story Eq. Juris., § 776, *supra.*

" Another reason why specific performance should not be decreed in this case is found in the *want of mutuality.* Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company. * * * And *it is a general principle that when, from personal incapacity, the nature of the contract, or* ANY OTHER CAUSE, *a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other*, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

Marble Company vs. Ripley, 10 Wall., 339, 359.

The mere giving of a note for the purchase money is not such a performance as equity requires from one who seeks specific enforcement of a contract.

Boone vs. The Missouri Iron Company, 17 How., (U. S.), 340, is like the present case in this respect, that the only performance by the complainants was the giving of notes for the consideration money, which notes were never paid. The complainants in that case also had abandoned their claim to the land.

The Court in that case said :

"*It would be difficult to find any case where the objections to the specific execution of a contract are more insuperable than in this case. In the first place the consideration for which the property was purchased has not been paid ;* and the Statute of Limitations would have barred a recovery on the notes given, if suit had been brought on them at the time this bill was filed. It is true the purchaser from Thomas, Van Doren, agreed to pay these notes ; but, not having done so, the assignment affords no excuse for the negligence of Thomas in his lifetime. *And there is no principle in equity better settled than that he who asks a specific execution of his contract must show a performance on his part, or that he has offered to perform. Neither of these has been done in this case.*

Boone vs. Missouri Iron Co., 17 How., (U. S.), 340, 343.

If Moore had brought an action at law for the purchase money, either in the lifetime of Monroe or after his death, he could have recovered nothing.

The debt for the greater part of the purchase money was secured by the note for $240. That note was surrendered to Monroe with Moore's consent, or in any possible view with his acquiescence, and it was the intention of Moore that such surrender should extinguish the note and the debt secured thereby. Therefore, both the note and the debt secured by it were discharged.

If the payee of a promissory note surrenders it to the maker for the purpose of discharging the liability of

the latter for the payment of the note, both the note and the debt secured by it are discharged. This rule holds, though the note be payable *to the order* of the payee and yet not endorsed by him. This rule prevails in courts of *law* as well as in *equity*.

This was the decision in the Supreme Court of Massachusetts, in *Hale vs. Rice*. The notes in suit in that case were not the notes surrendered to the maker. But the defense made was that the notes in suit were without consideration, for they were given in renewal of an old liability *which had been discharged by the surrender of the notes on which the liability existed, even though the notes were not indorsed.*

Hale vs. Rice, 124 Mass., 292.

The same decision has been made by the Supreme Court of Indiana.

" The surrender of a note is *prima facie* a satisfaction or relinquishment of the debt evidenced by the note."

Sherman vs. Sherman, 3 Ind., 337, 342.

This decision was approved and followed in *Peabody vs. Peabody*, 57 Ind., 556, 562.

But, even if the note were still alive, yet Moore could not have recovered on it, either in the lifetime of Monroe or after his death, because of the defense of failure of consideration for the note, a defense which was open as between the parties. The deed from Moore to Monroe cannot in this connection be regarded as a conveyance, and, therefore, as a sufficient consideration, for the covenants in the deed were broken as soon as made, and no title passed to Monroe. And, although in some cases a conveyance by a grantor who has no title may be a good consideration, yet it is so only provided the grantee accepts such title as the grantor has

and the deed be treated, as it ought to be treated, as a deed and not as a contract to convey. Such an argument, as that the deed was a sufficient consideration even if the grantor had no title, evidently cannot be applied here where the plaintiffs must argue that the deed is to be treated as a contract to convey.

That a covenant of warranty is broken as soon as made, if the land be at the time and continues to be in the possession of a third party who claims by a superior title. See *Duvall vs. Craig*, 2 Wheaton, 45, 61, 62.

Rawle on Covenants, 3d Ed., pp. 254, 255, and cases cited.

The same defense that would have been good as between the parties to an action on the note would also have been good as a defense to an action for the purchase money, if there had been no note in the case.

VI.

The complainants' case is barren of all equities.

FINALLY, a consideration of controlling importance remains to be specifically suggested, and that is, that on its broad merits, THE COMPLAINANTS' CASE IS BARREN OF EQUITIES. The deed on which their whole case rests is and always has been inoperative as a deed for the reasons stated in Point IV. (*ante*, pp. 70–98). The complainants admit this, but say that it is *good in a court*

of equity as a contract to convey. I have, I think, successfully combated that proposition (*ante*, pp. 82–88). But if the deed *can* be treated in equity as a contract to convey, such contract must stand when it is sought to be specifically enforced like any other contract and be governed by the same rules as in other cases.

Now, no suitor has a right to the specific execution of a contract even if it is valid. Courts of equity often leave a party to his remedy at law. They always do this except when he comes, and comes seasonably, with a meritorious case based upon a valuable consideration and good faith.

The complainants have no merits. They are seeking to get land for which it is indisputable, not only *that they have never paid, but for which in their bill they do not offer to pay.* How is it possible that a court of equity can disregard this fundamental and radical want of equity?

On what principle *can* the Court decree land to a party when he has not paid for it and does not offer to do so? Not only so, but they are seeking to enforce in equity (not content with their remedy at law) a contract, which for nearly six years before this suit was brought they had treated as *rescinded and abandoned* (holding possession of the purchase money note obtained under a claim of right), and which they would have continued so to treat, if at the date of filing the bill the land had not greatly increased in value. No possession had been taken by Monroe under the deed; no expenditures made on the land, not a cent; no taxes paid, not a cent; Monroe declaring to disinterested witnesses that he did not want the land and *would not have it;* the note representing all the purchase price but $10, obtained back with the consent

and acquiescence of Moore, which acquiescence had lasted for nearly six years before this bill was filed; the legal title conveyed by its absolute owners to the defendant Mrs. Moore; and now this party, who, in our view is out of pocket not a cent, but who, at the utmost is only out of pocket in the sum of $10, comes after this long delay stimulated only by the fact that just before suit was brought the land gave indications of great value, and asks a court of equity to decree the land to him.

Complainants are without equities, their case is without merits.

The untutored sense of equity of plain John McKay, who knew all the facts when he said to Mrs. Monroe at the time she was devising this suit "to *beat* Moore out of this land" (p. 25), "*that she had no right to the property, because she had got the note back*" (p. 25), five years before, and had kept it and never paid it, laid down a principle of natural equity and justice which strikes the unlettered and the learned, the lay and the professional mind with equal force, which is decisive of this whole controversy, and which any chancellor must affirm.

Monroe's direction, in 1876, to his wife in respect of the $240 purchase money note, to "*put it by*" (*Record, p. 69*), instead of at once returning it, was a decisive act of rescission; and followed by the retention of the note for nine years and its non-payment up to this time, was a positive and continued act of abandonment of the contract which, without more, is an insuperable bar to any relief in a court of equity. To say that Moore's consent or request four years after such rescission and abandonment, viz., on December 16, 1880, to McDonald and McKay to make a deed to Mrs.

Moore, was a fraud on Monroe, or on any existing legal duty which Moore owed to Monroe (which is the sole ground of the Opinion and Decree below), is a proposition without any reason or justice to support it.

JOHN F. DILLON,
For the Appellants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888. No. 700.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, Jr., sole heir at law of Helen Moore, deceased, by his Guardian, NATHANIEL D. MOORE, and JOHN McKAY, Administrator of the Estate of Helen Moore, deceased,

Appellants,

against

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANTS

—BY—

DAN. H. BALL,
IRVING D. HANSCOM.

MINING JOURNAL PRINT, MARQUETTE, MICH.

UNITED STATES SUPREME COURT.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, JR, sole heir-at-law of Helen Moore, deceased, by his guardian, Nathaniel D. Moore, and JOHN MCKAY, administrator of the estate of Helen Moore, deceased, *Appellants*,

v.

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

BRIEF.

STATEMENT OF THE CASE.

Sometime in January, 1875, Nathaniel D. Moore, who had returned from an exploring tour for minerals, informed one James H. McDonald, that he thought the northeast quarter of section 16, in township 47 north, of range 46 west, in the county of Ontonagon, Michigan, had indications of value for iron ore, and recommended its purchase.

Moore's exploration had been solely on his own account. The only conversation he had with Mc-

Donald was just before he started out for the woods, when McDonald said to him: "If you see anything that makes your eye water, let me know" (Rec. p. 12-13).

After McDonald had been advised by Moore, of the mineral indications on this land, he went to one John McKay and persuaded him to furnish half the money, and join in the purchase of the land from the state (Rec. p. 15).

Moore had no agreement in writing for any interest in the land, according to the great preponderance of evidence, nor any oral agreement; nothing more than a kind of mutual understanding, that as it was customary for explorers to get some interest, a quarter, a third, or sometimes an one-half, that McDonald and McKay would do what was right in the matter. McDonald and McKay intended at the time that Moore should have some interest in the land, and Moore expected it, relying upon them to do what was right (Rec. p. 15).

The requisite amount for the purchase of the land was furnished by McDonald and McKay, and handed to Moore, who then, on or about the 26th of January, 1875, went to Lansing, and with the money so furnished him bought the land (See Abstract, Rec. pp. 78-79).

He caused the title to be taken in McDonald and McKay, without any arrangement or agreement therefor, and without any declaration of trust in his favor.

Moore was in debt at the time, both to McDonald and McKay, and whatever the understanding was, they did not expect or intend to, and would

not, convey to Moore any interest until he had fully settled with them. It appears that Moore was poor, and unable for a considerable time to fully satisfy them in regard to his indebtedness.

Sometime in the fall of 1875, McDonald and McKay had a deed drawn up, concerning which oral testimony has been given by the complainants, subject to the objection of the defendants that the testimony was incompetent, no proper effort having been made to produce the original, or its absence sufficiently accounted for.

According to the oral testimony, however, it was signed by McKay, but not by his wife, who refused; whether it was signed by McDonald is uncertain, the weight of evidence is that it was not.

In any event, it is conclusively shown that the deed was not only never delivered, but that positive instructions were given Mr. Viele, the notary in whose possession it was left, not to deliver it, but keep it until further orders were given. No further orders were ever given (Rec. p. 13).

The deed was never completed, was of course never delivered to Moore, and Moore never knew even of its existence (Rec. p. 36).

On the 18th of October, 1875, John Monroe, of Ishpeming, Michigan, had a talk with Moore, and was desirous of buying an interest in this land. John Monroe and John McKay had married sisters, and Monroe knew that McKay and McDonald had bought the land, and that Moore had no deed of any interest in the land, but expected to have a deed (Rec. p. 37).

Moore sold Monroe an one-sixth interest in the land, giving Monroe a warranty deed therefor, and Monroe in consideration for the conveyance gave Moore his note for $240, and $10 in cash, the entire purchase price being $250 (Rec. p. 37).

Monroe made inquiries of McKay and McDonald, as to the prospects of Moore in obtaining title to an interest in the land, and was informed that it was uncertain whether he would ever have title.

Monroe became dissatisfied, and decided that he did not want the land anyway, and afterwards declared to McDonald that he would not have it, but was desirous of getting what Moore owed him. It seems that Moore owed Monroe $150, that Monroe had let him have in another transaction, besides the $10 paid Moore by Monroe as part of the purchase price of this land (Rec. p. 30).

Monroe, soon after this last conversation with McDonald, went to Moore and told him he did not want the land, but wished to get back his note and to get what Moore owed him. Moore told him the note was at John McKay's. Monroe said he knew it, and could get it, and Moore replied that that was all right, he could do so (Rec. p. 38).

But as Moore did not have the money with which to pay the indebtedness to Monroe, Monroe agreed to take his note for the $150 which Moore owed him, and the $10 paid on the purchase of this land, and that Moore might pay it in installments, and that he would not charge him any interest for the time he had had the money.

Moore then gave Monroe his note for the $160,

and Monroe promised to return to him his deed, saying that it had not been recorded.

In July of that same year, Monroe's wife (now Mrs. Crawford, one of the complainants) went to McKay's house in Hancock, Michigan, by the direction of her husband, as she then claimed, and got the $240 note which Monroe had given Moore at the time of the purchase of this land. She took it home, showed it to her husband, and was directed by him to "put it by;" it was thereupon put away among their papers where it remained until nine years afterwards, when Monroe's widow (now Mrs. Crawford) produces it in evidence in this case Rec. p.p. 20 and 23).

Monroe continued to live at Ishpeming until some time in the spring of 1878, when he moved to Canada with his family. From there he went to Colorado, and in August of that year, died.

During his lifetime he never made claim to the land. After getting his note back he never made any further inquires about Moore's prospect of getting a deed, nor, so far as the record shows, ever paid any further attention to the matter.

Monroe never paid the note, never offered to, or offered to return it, nor was he ever asked to pay or return it.

Nothing further was ever heard of any pretended claim to the land by Monroe or his heirs, until more than five years after Monroe got back his note.

The land was sold for taxes of 1875, 1876 and 1877 to one Ayer, who obtained his deed from the

Auditor General, in June, 1880 (See Abstract Rec. p. 78).

On the 1st of October, 1881, Ayer, for the consideration of $200 quitclaimed to McDonald, and McDonald on the 21st of June, 1883, more than a year after this suit was commenced, quitclaimed to Helen Moore, for the consideration of seventy-five dollars (see Abstract, on page 78).

McKay and McDonald had previously, on the 16th of December, 1880, conveyed all their interest in and to an undivided one-third of the land to Helen Moore, but whether at their own suggestion or Moore's is indefinite, but presumably at Moore's request, Moore having in some way satisfied them as to his indebtedness to them (Rec. p. 53).

In February, 1882, Mrs. Crawford, in behalf of herself and the heirs of John Monroe, filed this bill alleging,

1st. That at the time of Moore's deed to Monroe, McDonald and McKay held the absolute title "In fee simple of the whole of the northeast quarter of said section 16," but that they "held an undivided one-third thereof in trust for the said Nat. D. Moore, by an arrangement between the said McDonald and McKay, on the one side, and the said Moore, on the other, entered into before, or at the time, the said McDonald and McKay acquired said title."

2nd. "That in order to carry out said trust and to vest the legal title of an undivided one-third of said lands in said Moore, said McDonald and wife, and McKay * * * made, executed, acknowledged and delivered a deed of an undivided one

third part of said lands to said Moore at his request.

3d. That said Nat. D. Moore and Helen Moore suppressed or destroyed said deed to Nat. D. Moore, and procured one to be made to said Helen Moore "for the purpose of *cutting out* complainants' title".

Defendants answered, denying any trust for Moore; denying any deed to Moore, and any suppression or destruction of such deed; and claimed that the sale from Moore to Monroe was rescinded by mutual consent.

The evidence failed to show any trust in McKay and McDonald for Moore; or,

The execution and delivery of any deed by McDonald and McKay to Moore; or,

The suppression or destruction of any such deed by Moore or his wife; and such was the finding of the court below.

But the evidence did show that in 1876 Monroe got back the entire consideration which he gave Moore for the deed; that Mrs. Monroe obtained it, assuming and alleging at the time that she was acting for her husband; that she took it home, showed it to him, and he gave directions where to put it; that about the same time Monroe told McDonald that he did not want the land and would not have it; and Moore testifies positively to an express agreement of rescission. Monroe always kept the note, and never made any claim, so long as he lived, to the land; never paid, nor offered to pay; never returned or offered to return, the note. After nine years of retention of the note by Monroe and his widow, the note was first seen, and its existence made known to Moore when introduceed in evidence in this case.

QUESTIONS INVOLVED.

The first question presented by the record is, whether or not the complainants have not wholly failed to sustain the case made by their bill.

Defendants insist upon such failure, because

1st. Complainants failed to establish the trust in favor of Moore; or the deed to Moore, conveying the legal title to him, whereby complainants claimed to have the legal title; or the suppression or destruction of the deed for the purpose of "cutting out" such legal title.

2nd. With these allegations left out as unproved, defendants insist that there is nothing left in the bill upon which complainants would make out a case for relief, and especially within any established rule of pleading and practice. That complainants have failed to sustain "the case stated by them in their bill".

The second question arises upon the following facts:

1st. McKay and McDonald were the absolute owners in fee simple of a parcel of land subject to no trust or equities of any kind or nature in behalf of any one.

2nd. Moore (who had no title or interest therein) gave Monroe a deed of conveyance of said land.

3rd. Afterwards, the title remaining in the same perfect condition in said McKay and McDonald, they, at Moore's suggestion or request, voluntarily conveyed the land to a third party.

Question presented. Does such third party take the same perfect title possessed by the grantors at the time of the conveyance, or does Monroe, who had no previous title or equities in the land, become the real owner of the land, because his grantor who had no title, consented to the conveyance by the absolute owners to a third party?

The third question presented is one of fact, viz: whether the evidence shows an express agreement of rescission between Moore and Monroe of the sale of the land, and

4th. If it does not, whether the evidence is not sufficient and ample, that Monroe, at least, pursued such a course as would justify any reasonable person in believing that he rescinded the sale, and that he is bound by his acts in that regard as strongly as though there had been an express agreement to that effect.

5th. The question is presented whether the court below was justified in throwing Moore's testimony entirely out of the case, especially when based upon an arraignment of facts which are not in the record, but squarely contradicted by the record.

6th. The question is presented whether or not a person who holds the absolute title in fee simple to a piece of real estate, may not voluntarily convey the same to whom he will, and convey the same absolute title he himself possessed, or

7th. Whether, in the case last presented, a third party, having no interest, legal or equitable in the land, can, either by consenting or withholding consent to such a conveyance, defeat the con-

veyance, because he, not possessing any interest whatever, had previously given a deed to a fourth party.

8th. Whether, when a party to a contract has by his acts distinctly shown his intent to abandon the same, and dies without having shown a contrary intent, his heirs inherit, by the laws of descent, any right to avoid such acts, and re-establish contract relations, and by returning the property obtained by their ancestor re-create alleged rights in real estate, which a court of equity will recognize and enforce.

Lastly, whether a person who has recovered back the entire consideration of a contract of sale (especially where no title passed); is placed fully in *statu quo*, and so continues for six years; and then comes into court asking for a decree for the property, without having paid a penny, or offered to pay, even in the bill of complaint; without returning or offering to return the original consideration which he took back years before; whether such a person under such circumstances is entitled to the ear of a court of equity for a single moment of time.

OBJECTIONS TO THE DECREE.

The erroneous character of the decree appealed from, appears to us to have been sufficiently pointed out in the foregoing statement of the case, and questions involved.

It is not based upon any known principle of equity, and is contrary to every principal applicable to the case, recognized by courts of equity.

It is unjust in rejecting wholly the testimony of Nathaniel D. Moore, who is corroborated by disinterested witnesses, and by every fact in the case, and stands uncontradicted.

The rejection of his testimony is unwarranted and unjust, also, in that such rejection is based upon alleged data and facts not in the case, while the actual undisputed facts in the record are all in his favor, and furnish no basis for reasonsble criticism, especially when it is considered that his testimony, and nearly all the testimony in the case, was taken nine and ten years after the transactions testified to, occurred.

The decree is erroneous in that it fails to find a rescission of the sale from Moore to Monroe, even regardless of Moore's testimony, on the undisputed facts in the case.

It is erroneous in that it gives complainants relief, notwithstanding they have not made out the case stated by them in their bill.

It is wholly contrary to the equities of the case, upon the undisputed evidence, Monroe having re-

covered the entire consideration from Moore in 1876 and moved away to Canada, and never after during his lifetime, nor his heirs for at least six years, ever making the slifihtest pretense to any claim in the land, or intimating that they did not feel bound by the rescission; never, up to the present moment, having paid or offered to pay anything, nor returned or offered to return the consideration, which was carried away to Canada years ago.

It is erroneous in that the bill should have been dismissed, upon the complainants' own testimony.

Their first witness, McDonald, testified that there was no contract with Moore that he should have an interest in the land; that no deed to Moore was executed and delivered. They produce the note in court, and admit having had and kept it for at least nine years. Mrs. Crawford (one of the complainants) testifies specifically that when she brought the note home and showed it to her husband, he asked no questions, nor did she, he only said casually "put it by", and she put it away in the drawer with their papers, and it remained in their possession until she gave her testimony on the 23d day of July, 1885.

It is erroneous in that it decides that when McKay and McDonald were the absolute owners in *fee simple* of the land in question, and voluntarily conveyed the land to Helen Moore, at a time when the land was absolutely free of any equities in behalf of any one; that such absolute estate so conveyed to her she cannot hold, because it was conveyed in part at the suggestion of Nat. D. Moore, who, with-

out right, title or interest in the land, had previously given a deed to Monroe of the same land.

It is erroneous, in that it holds and decides that an absolute stranger to the title of a parcel of land can create a trust therein, and deprive the absolute owners of the right of conveying a complete title to a third person, at least when such conveyance is made at the solicitation or request of such stranger to the title.

It is erroneous in that it holds, substantially, that where a person takes such decided steps toward the abandonment of a contract, that he recovers the whole consideration, and then dies, that his heirs *inherit* the right to set aside his acts, and claim rights in real estate, wholly inconsistent threwith; and further, that such heirs are in a position, in equity, to claim that the acquiescence of the other party to such abandonment, and his acts in conformity thereto, would be such a fraud upon the party so abandoning the sale, as entitles such heirs to return the original consideration, and claim rights under the original contract of sale, after the lapse of nearly six years from the time of such abandonment.

THE PROOFS DO NOT SUSTAIN THE BILL.

The bill alleges (Rec. pp. 2 and 3):

1st. That on the 19th of October, 1875, Nat. D. Moore, "in consideration of the sum of *two hundred and fifty dollars paid to him*" *by John Monroe* (who died in August, 1879, leaving complainants as his sole heirs-at-law), executed, acknowledged and

delivered to said John Monroe a warranty deed of the undivided one-sixth interest, in the northeast quarter of section 16, in township 47 north, of range 46 west, in the county of Ontonagon;

2nd. "That on or about January 26th, 1875, James H. McDonald and John McKay became the owners in *fee simple* of the whole of said northeast quarter of section sixteen, holding the entire legal title thereto, *but holding an undivided one-third thereof in trust for the said Nat. D. Moore*, by an arrangement between the said McDonald and McKay, on the one side, and the said Moore on the other side, entered into before or at the time the said McDonald and McKay acquired said title";

3d. "*That in order to carry out said trust and to vest the legal title of an undivided one-third of said lands in said Moore*, said McDonald and his wife and said McKay, sometime between January, 1875, and March, 1881, made, executed, acknowledged and delivered a deed of one undivided one-third part of the said lands to the said Moore, at his request;"

4th. That the said Nat. D. Moore and his wife, Helen, have suppressed or destroyed the aforesaid deed to Nat. D. Moore, and procured a deed to be made from McDonald and McKay to Helen Moore on or about January 29th, 1881, "for the purpose of *cutting out* complainants' title to the undivided one-sixth of said land, and that defendants refuse to recognize complainants said title, and deny that complainants have any title."

Thereupon, complainants pray that Helen Moore be compelled to execute and deliver a warranty deed or deeds of the undivided one-sixth of said

premises to complainants, in the proportions in which they are respectively entitled, as sole heirs of said Monroe.

It is upon these allegations that complainants have come into court, filed their bill and claim relief. It is upon these allegations that issue has been joined, and proofs taken, and according to the well established rules of equity practice, "complainants must stand or fall by the case made by the bill."

Kelly v. *Kelly*, 53 Mich. 30.
2 Dan. Ch. Pl. & Pr., 1037, and cases cited.
Piatt v. *Vattier*, 9 Pet. 404.

We propose, therefore, to examine the proofs in reference to each of these allegations respectively, in their order.

1st. That portion of the allegation which states that Nat. D. Moore executed and delivered a warranty deed of the land in question to John Monroe, is admitted by the answer, but that portion which states that Monroe paid Moore as a consideration therefor the sum of *two hundred and fifty dollars*, is not only denied by the answer, but conclusively shown by the proofs as incorrect.

It appears by the testimony of Moore, Jane McKay, John McKay and William D. McIntyre (to all which testimony we will more fully refer under another head of this discussion,) that Monroe gave his own note for $240 of the purchase price of the land, and the complainants produce and offer in evidence said $240 note, which it is conceded has never yet been paid. There is no evidence to the contrary in the record.

Complainants have made no attempt to amned their bill in accordance with the proofs in this respect, although several years have elapsed since said proofs were taken.

We submit that it is a material allegation which they have failed to prove.

To show its materality, let us suppose that complainants had set forth the facts in this regard according to the proofs, alleging that Monroe gave his note for the purchase price, and that he had never paid the note, would it not have been incumbent upon complainants in a court of equity to have alleged a tender, or at least made an offer in their bill to pay, before they would have had any standing in equity, in accordance with those leading principles in equity that "He who seeks equity must do equity," and "He who comes into equity must come with clean hands." This is fundamental.

Pomeroy on Contracts, sec. 323.

2d. That portion of the second allegation of the bill which states that in January, 1875, McDonald and McKay "became the owners in *fee simple* of the whole of the northeast quarter of said section 16" is admitted by the answer, but that portion which states that they held "*an undivided one-third thereof in trust for said Nat. D. Moore*, by an arrangement between them, is denied by the answer, and wholly unsustained by the proofs."

The only witnesses who testify upon this branch of the case, are McDonald, McKay, Moore and William D. McIntyre.

The first three witnesses named, comprising all the parties to the alleged "arrangement," each deny any agreement whatever, whereby Moore was to have an interest in the land.

McDonald was the first witness examined *on behalf of the complainants*, and testified that there was no contract with Moore of any kind; that Moore merely relied upon him (McDonald) to do what was right in the matter; that he expected to give Moore an interest, but that no interest was ever agreed upon or mentioned.

McKay and Moore each fully corroborate McDonald.

We will quote briefly from the testimony.

McDonald testifies (Rec. p. 12) as follows:

Q. Did you have an arrangement with him, you and Mr. McKay, in regard to deeding him an interest for locating the land? A. Well, I can tell the whole circumstances. When he went out, I told him if he could see anything that would make his eye water to let me know. I don't know as I ever spoke to him about an interest, but it was always understood, you know, when a man looked up minutes that he should have an interest in it. So when he came back he told me to enter such and such land. I don't remember as I said anything about any interest or anything about it, but it was always understood.

Q. Well, what interest was he to have in the land for locating it and giving you the minutes? A. I could not say.

Q. Wasn't it a one-third interest? A. I could not say; I believe not; as a general thing it is a

quarter; *there was nothing ever said about what interest he should have, but he was to have an interest.*

Again, on cross-examination he says (Rec. p. 14):

Q. When was it that Moore explored this land? A. It must have been in '75.

Q. You made an arrangement with him as he was going out in the woods looking over land, seeing if he could find anything desirable to enter, did you? A. *I didn't make any arrangement*, only just what I told you, if he would see anything that would make his eye water to let me know.

Q. There was no agreement as to interest then? A. No, nothing said. I don't know as I ever talked to him about interest.

Q. When he came in and told you to enter the the northeast quarter of section 16, what did you do? A. I gave him the money and he went to Lansing and entered the land.

Q. The land was entered in your name? A. In my name and McKay's.

Q. When he reported this land to you and you gave him the money to go and locate the land for you and McKay, did you agree to give him any interest? A. No, sir; not as I remember. I never agreed to give him anything.

McDonald also says that whatever there was of an understanding was between himself and Moore.

John McKay corroborates this (Rec. p. 25), and further says: "I don't think we gave Moore any memorandum about it then, or at any time; I don't remember us giving him any writing for it."

Moore also testifies that he never had any contract in writing for this land (Rec. p. 36).

The last witness to testify upon this point is William D. McIntyre, a brother of Mrs. Crawford, one of the complainants.

He undertakes to contradict all three of the parties who would be most likely to know all the facts, and from their personal interest in the transaction, most likely to remember.

McIntyre testifies (Rec. p. 56) that he furnished all the money for the purchase of the land, contradicting both McKay and McDonald.

McIntyre further says that "there was an agreement drawn up between Moore, McDonald and McKay" (Rec. p. 57), and that he heard it read and saw it signed.

Q. State your recollection as to what the agreement was? A. That Moore was to have a third interest in the property.

Q. What was done with the paper? A. McDonald held the paper *as far as I can learn.* This answer shows clearly that the witness is not testifying from his own personal knowledge. "As far as I can learn," indicates, if he was testifying truthfully, that this was his understanding from some information he had received.

Again, he was asked plainly: "What is your recollection now as to what was done with the paper?" He replied: "I think that McDonald held the paper after it was signed, but I couldn't be certain whether it was Moore or McDonald."

This testimony was read over and signed by the witness three or four days after it was taken, and in the absence of defendants' counsel (see Rec. p. 88), but by consent of counsel, and then the wit-

ness corrects it by saying "Moore held the paper." He says: "I must have misunderstood the question." But it will be entirely clear by reading his testimony on page 57 of the record, that he could not and did not misunderstand the question.

But McIntyre's testimony on this point was clearly, under all rules of evidence, wholly incompetent. It was in direct violation of the rule that the contents of a written instrument cannot be proved by parol, without either any notice to produce the alleged original, without proving its loss or destruction, or making any effort to produce it.

Between six and seven months after the taking of this testimony, and at the close of all the testimony in this cause (Rec. p. 110), a notice to produce the alleged agreement was served upon the defendants' counsel, or that "parol or secondary evidence of the contents of the same" would "be given and used."

We have referred to this testimony of McIntyre's relative to what was done with the agreement, and his contradictory statements relating thereto, and his uncertainty as to who took or kept the agreement. And on this point Moore swears positively (Rec. p. 109) that he then had no such contract, and never had one. So that, with the uncertain and contradictory testimony of McIntyre as to who took the agreement, and the positive testimony of Moore that he had not then, and never had such an agreement; it cannot be fairly claimed that the alleged paper has been traced into the possession of Moore, by any fair preponderance of testimony, and especially when McKay,

McDonald and Moore each deny any knowledge of any such agreement.

And in any event, we submit, that a notice to produce an alleged written agreement, which is served more than six months after the incompetent testimony is taken, cannot render such incompetent testimony, competent. We say therefore, that the execution of such agreement was not proven in the first place; it was not traced into the possession of the defendants; it was not shown to be lost or destroyed; and lastly, the meager proof of its execution was introduced without notice to produce the written instrument itself.

His testimony amounts to nothing, as it is not only squarely contradicted by McDonald, McKay and Moore, upon points concerning which they each had at least equal opportunities for knowing the facts, but it is unreasonable in itself.

But beyond all question of its credibility, it is wholly worthless in that it does not set forth any contract. All he pretends to state, even of the substance of the contract, is "that Moore was to have a third interest in the property."

This comprises all the testimony as to the contents of the agreement.

Counsel for complainants then asked the witness "what the consideration was for his getting this third interest," and "who signed the agreement," etc.

But it cannot be fairly claimed that either of those subsequent questions, or the answers thereto, related to the contents of the written agreement, for the reason that they each just as clearly relate

to the witness' understanding of matters outside the written contract, derived from the conversations of the parties, or from the subject matter of the transaction, and because neither the questions nor answers expressly refer to the contents of the instrument. It would be an exceedingly dangerous doctrine to allow such answers to stand as statements of the contents of a written instrument, by inference merely, when it is at least equally reconcilable with the proposition that his answers only gave his understanding of the arrangement between the parties, and that, too, at a period of more than ten years from the time of the alleged transaction.

If the witness McIntyre were wholly uncontradicted, his statement of the terms of the contract would be entirely too indefinite for enforcement in equity.

Such an agreement, to be valid and enforceable, must be complete in itself, without resort to parol evidence. This is an elementary doctrine of the courts of equity.

Pomeroy on contracts, Sec. 145.

"I lay it down as a general proposition," says Lord Rosslyn, in the case of *Lord Walpole* v. *Lord Oxford*, 3 Ves. 420, "to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined; secondly they must be equal and fair; and thirdly, they must be proved in such manner as the law requires."

The statement "that Moore was to have a third interest in the property" does not constitute any contract whatever, which a court of equity would

or could enforce. The land at the time referred to by the witness belonged to the state of Michigan, but the agreement testified to by McIntyre, made no provision as to who should furnish the purchase money, or who should buy the land, nor in whose name or names the title should be taken, nor how or when Moore should obtain his one-third interest.

A much stronger state of facts will be found in the case of *Webster* v. *Gray*, in 37 Mich. page 37, but the court refused to consider the writing in that case, which was actually produced in court, as a contract.

That was a case where one Webster agreed to do certain exploring work for a quarter interest in the land located from his minutes by one Gray. The memorandum referring to that part of the agreement was as follows:

"Also he (Webster) has an undivided one-fourth interest in all of the following lands that I may be able to reserve at Lansing, to-wit, the minutes of which he left with me June 27th, to-wit, about 1,800 acres, in towns' as follows: T. 14 N., R. 15; T. 15 N., R. 15; T. 16 N., R. 15;" which paper was signed by Gray.

The court held that the exploring work which Webster had done could be readily estimated according to its actual value, and therefore he had ample remedy at law, and could not come into a court of equity for a specific performance.

The court further intimated that some six years having elapsed between the date of the contract and filing the bill, the claim had become stale by lapse of time.

If in that case complainant was not entitled to relief, because he had an adequate remedy at law; how much less would Moore have been entitled to relief in equity. Whatever of exploring he had done, he did on his own account, and previous to any pretended contract; he furnished no part of the purchase price; performed no services save going to Lansing and obtaining the deed, which services could be as easily compensated in money damages, as the services rendered in the above case, and much more easily.

Again, if the written contract was not sufficiently certain for enforcement in that case, what shall be said of the one in the case at bar, as testified to by the witness McIntyre, the whole substance of which was that Moore was to have one-third of the land.

We find therefore, from a consideration of the proofs in this case, that there is not a particle of evidence of any parol agreement whatever, that Moore was to have an interest in the land, and that what evidence there is of a written agreement comes solely from one witness, and he a near relative to the complainants, and is contradictory in itself, and is contradicted by three fair witnesses, two of whom are wholly disinterested parties to this cause; and besides, his statement of the agreement is too indefinite in its terms for recognition or enforcement in equity.

It is not pretended that Moore did his exploratory work under any agreement. The entire testimony upon this point is that given by McDonald, who says all there was of any arrangement between

them at that time was, that he told Moore when he went out in the woods, "if he saw anything that made his eye water" to let him know.

Again, if there had been a complete parol contract, it would have been void under the statute.

Section 6181 of Howell's Statutes (Michigan) provides as follows:

"Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands shall be void, unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing." (See authorities cited in note to the above section.)

Finally, had there been a parol contract partly performed, or a valid written contract, by which Moore was to have an interest in the land, it was absolutely disposed of, and such interest terminated when Moore went to Lansing, and with money furnished by McKay and McDonald bought the land, and voluntarily caused the title to be taken in the names of McKay and McDonald, without having or taking any declaration of trust from them.

Such would be the case beyond any doubt, under the statutes of Michigan.

Section 5569, How. Stat., provides as follows: "When a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

The next section merely provides that "such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration".

This provision of the statute of Michigan has been frequently passed upon by the supreme court of the state, and the decisions are uniform. As was said by the court in the case of *Fisher* v. *Fobes*, 22 Mich. 454: "The purpose of the statute is to preclude parties from asserting equitable interests in land where they must rest on parol evidence, in opposition to the written instruments of title which have been made *with their consent and approval.*"

Section 6179, How. Stat., is as follows: "No estate or interest in lands, other than leases for a term not exceeding one year, *nor any trust or power over or concerning lands, or in any manner relating thereto*, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

"The statute covers every case where an interest in land is divested by act of the party, and applies to surrenders as well as transfers."

Whiting v. *Butler*, 29 Mich. 144.
Trask v. *Green*, 9 Mich. 366.
Groesbeck v. *Seeley*, 13 Mich. 345.

In *Bumpus* v. *Bumpus*, the court uses the following language:

"The case is one of the purchase of lands by a party who causes them to be conveyed to another instead of to himself; *and in such a case*, unless the

grantee gives back a written declaration of trust, or some contract to convey to the purchaser, *he has a legal right to retain what has been deeded to him.* There is no implied trust in favor of the purchaser (How. Stat., sec. 5569); and as the alleged contract does not reach the case, there is therefore no basis for the bill."

Bumpus v. *Bumpus*, 53 Mich., 346.

"No such trust arises by implication in this state, where a grantor makes a voluntary conveyance, or *procures one to be made to another person.*"

Palmer v. *Sterling*, 41 Mich. 221.
Weare v. *Linnell*, 29 Mich. 224.
Garfield v. *Hatmaker*, 15 N. Y. 475.
Everett v. *Everett*, 48 N. Y. 218.
Stebbins v. *Morris*, 23 Fed. Rep. 300.

No one could question Moore's right in making the purchase, to take the title in McKay and McDonald, because no one else, at least, had any interest to be cut off. *This was nearly nine months before he gave his deed to Monroe.*

The allegation, therefore, that McKay and McDonald held an one-third part of said northeast quarter of section sixteen in trust for Moore, by some arrangement between them, is not only not sustained by the proofs, but on the contrary, is wholly disproved.

3d. The next allegation of the bill, in order, is, "That in order to carry out said trust and vest the legal title" in Moore, McKay and McDonald executed and delivered a deed to Moore, at his request.

The testimony is positive and wholly uncontradicted that no such deed was ever delivered. There

is testimony that a deed of some kind (the contents of which were not attempted to be proved) was partially executed and signed by McKay. Whether signed by McDonald or not is uncertain, and there is no evidence that it was. At all events, it was left with the notary and express orders were given that it should not be delivered without further instructions, which were never given, and the notary claims the deed was lost. (See McDonald's testimony, p. 13, McKay's, p. 23, and Moore's, p. 36, of record.)

4th. The last allegation of the bill, that Moore or his wife suppressed or destroyed the alleged deed from McKay and McDonald to him, for the purpose of "cutting out" the legal title of complainants, is wholly dependent upon the 3d allegation, that there was, in fact, such a deed executed and delivered to Moore.

If there never was such a deed in existence, as conclusively appears from the proofs, of course there was none to be suppressed or destroyed. Besides, there is not a syllable of testimony from any source that Moore or his wife ever saw or knew of the existence of any such deed.

We say, therefore, that under the proofs in this case, the complainants have not merely failed to establish, by a preponderance of evidence, any one of the four material allegations in their bill, but have failed to furnish any evidence tending even to support them.

Indeed, the court below had no difficulty in arriving at the same conclusion on all the facts touch-

ing each of the aforesaid material allegations of the bill.

The court finds (Rec. p. 134) that the so-called "arrangements" by which Moore was to have an one-third interest in the lands, "was so loose and indefinite in its terms, that, aside from any objection resting on the statute of frauds, it would not have warranted a decree for specific performance."

The court finds that: "The arrangement was altogether oral."

That "there seems to have been nothing more than a mutual understanding that McDonald and McKay would do "what was right'."

That the consideration for the deed was $250, "of which Monroe paid $10 in cash, and for the residue gave his promissory note to Mr. Moore, payable one year after its date."

Such an utter failure to establish by the proofs the material allegations of a bill, we venture to say, has rarely if ever, come before this court.

Strike out these unsustained allegations and there is nothing left in the bill, upon which to predicate relief.

Again, all the testimony relative to any oral understanding between Moore, McDonald and McKay, being wholly inadmissable under the statute, should be considered as stricken out of the record.

It would seem as though the defendants, in accordance with the ordinary rules of equity practice and pleading, might unhesitatingly leave the discussion of this case, at this point, with the absolute assurance that the complainants' bill would be dismissed.

But the fact that the learned judge who heard the case in the court below, found it possible to render a decree in favor the complainants, after having found that they had utterly failed to prove a single allegation of their bill, induces us, considering the importance of the case, to examine the new position, to which complainants have shifted since filing their bill.

II.

Their position now, is this: that Moore, having given a warranty deed of the land to Monroe, it was a fraud upon his part in afterwards consenting or requesting that McKay and McDonald should convey the land to Helen Moore.

And they argue, that notwithstanding Moore had no legal or equitable interest in the land, and that McKay and McDonald held the land absolutely in fee simple, free of any equities of any kind or nature, by reason of such fraud upon the part of Moore in not taking title himself, instead of allowing it to pass by his consent or request, to his wife, Helen, a constructive trust was created, whereby Helen Moore became the mere trustee of the legal title, and complainants became the equitable owners and beneficiaries under said trust.

The bare statement of the proposition ought, it seems to us, to be a sufficient answer in a court of equity, nevertheless we propose to examine it somewhat fully.

We shall assume at the outset, the following premises as settled beyond question, under the proofs in this case.

1. That in January, 1875, McDonald and McKay, by a purchase from the state of Michigan with their own moneys, became the absolute owners in fee simple of the land in question, subject to no equities to anyone, and that their title so continued until they parted with it to Helen Moore.

2. That Moore never had any enforcible contract for an interest in the land, and therefore never acquired any equitable estate or interest therein.

3. That Moore, having no possible estate or interest in the land, he therefore could convey none to Monroe by his deed, and none descended to Monroe's heirs.

4. That McDonald and McKay, being at all times the absolute owners of the land, had the unquestioned legal right to convey the same to whomsoever they wished, regardless of Moore or Monroe, and that their grantee would take as perfect a title as they had to convey.

If complainants are entitled to a conveyance of this land, it must be by virtue of some equitable principles. The laws relative to the transfer of title to lands are fixed and well understood, and it is of the greatest importance that this should be so.

So, also, "There are certain principles upon which courts of equity act, which are very well settled. The cases which occur are various but they are decided on fixed principles. Courts of equity have, in this respect, no more *discretionary* power than courts of common law. They decide new

cases as they arise, by the principles upon which former cases have been decided, and may thus illustrate or enlarge the operation of these principles, but the principles are as fixed and certain as the principles on which the courts of common law proceed."

Lord Redesdale in *Bond* v. *Hopkins*, 1 Sch. and Lef. 413, 429.
1 Pom. Eq. Juris. p. 49.

When complainants ask for the legal estate in a court of equity, they must first show that they have the equitable estate.

"An equitable *estate*, in its very conception and as a fact, requires the simultaneous existence of two estates or ownerships in the same subject matter, the one legal, vested in one person and recognized only by courts of law; the second equitable, vested in another person, and recognized only by courts of equity."

1 Pom. Eq. sec. 147.

When and how did complainants acquire the equitable estate in this land, that they now ask for the legal estate?

That they had no estate or interest in said land down to the time of conveyance to Helen Moore must be conceded. In fact, it is the complainants' answer to the charge of laches, that Moore had no interest in the land, and therefore Monroe acquired none, and hence never being in a condition to enforce specific performance, Monroe was not guilty of laches, so long as the absolute title remained in McKay and McDonald.

Complainants' claim, as now made, is based upon

the conveyance to Helen Moore. They claim that such conveyance was made to her for the purpose of carrying out the alleged original oral arrangement, by which Moore was to have an interest in the land, and that Moore aided in procuring the conveyance to his wife, and that this was such a fraud on the complainants as will give them the title to the land. But all the talk about the original indefinite "mutual understanding" being carried out, is an assumption not warranted by the proofs. There is no evidence that such understanding was based upon any agreement upon the part of Moore to settle up some old matters and indebtedness to McDonald and McKay. And yet the proof is positive that they would not convey to Moore, or to Helen Moore, until, at least, certain old matters, wholly distinct from this transaction, were satisfactorily arranged. What these outside matters amounted to, the evidence does not fully disclose, but McDonald's claims were for a pony sold Moore, for money lent and other things. (Rec. p. 33). In any event, however, the original indefinite mutual understanding was not carried out of itself, but other matters of a considerable amount were subsequently required to be adjusted, without which McDonald and McKay refused to convey. The original undersanding was never carried out.

And finally, when a conveyance was made to Helen Moore, it was as much at the suggestion of the grantors' as at Moore's, they knowing all the circumstances (Rec. p. 53). John McKay especially expressed his opinion to Mrs. Monroe regarding her dishonest attempt to claim the land after the

contract had been rescinded and Monroe had got back his note (Rec. p. 25).

If the parol contract sought to be proven would be insufficient to establish a trust which could be specifically enforced, then such parol contract is quite too insufficient to be used as a basis to support an allegation of fraud, because not carried out or carried out in some other way than originally proposed.

It seems to us an extremely absurd proposition, that a parol contract, void under the statute, and not admissible in evidence in any suit brought by the vendee against the vendors for its enforcement, can, nevertheless, be introduced and used in behalf of a grantee of such vendee—a mere assignee of the vendee's rights—upon the alleged ground that a subsequent conveyance of the property to a third party was a fraud upon the rights of said assignee, who had no rights.

We submit, that the contract being void at its inception under the statute, as between the parties, and so remaining up to the conveyance to a third party: and the original vendee in such void contract never having acquired any legal or equitable interest therein to the present time, the assignee of such vendee can have no interest. The contract being void, it is equivalent to saying there was no contract.

In this case it is sought by complainants to avail themselves of a void contract; not only void under the statute, but void as being incomplete and insufficient in its terms for enforcement, which is equivalent to saying there was no contract—to

raise a constructive trust in their favor, because such contract is not carried out in the manner desired by them, alleging that it was an equitable fraud upon them—not a fraud between the grantors and grantee in the conveyance, but a fraud committed by a person having no legal or equitable interest in said land, because he requested such a conveyance to be made—that his influence in bringing about such conveyance makes it a fraud upon the part of such grantee to become the recipient of a voluntary conveyance from the absolute owners, who voluntarily conveyed without any fraud or imposition being practiced upon them, or upon any other person having any rights or interest therein.

Complainants claim that their rights arise under the execution of the void contract; that although its execution was wholly voluntary, and they had no right or standing in equity to ask that it be executed in any other manner, or indeed to be executed at all, yet such voluntary execution, by some unexplainable principle of equity, was a fraud upon their rights, which they did not possess, because it was not so executed that they would have acquired rights; that, because this conveyance was not made in a manner, which no one had any equitable right to insist upon, and which no one could have compelled, they therefore acquired the same rights because it was not so executed, which they would have acquired had they been possessed of the equitable right to have compelled such conveyance. Their equitable right to the land is based upon the fact that they had no right, and

that it was a fraud to deprive them of those rights. In other words, the land has proven valuable, and they want it, rights or no rights.

"The exact limit of all the adjudged cases, is confined to cases where the party against whom the parol trust is established has prevented the grantor, *by fraudulent promises*, from adopting some other mode of accomplishing his purpose which he was about to adopt, and induced him to place it in the power of such party to convert the property to his own use." * * * * "It will be observed that in all these cases there is *something more than the mere receipt of the title* to real estate, with a parol promise to hold it, subject to a trust. There is an interferance with the owner of the property *by means of which he is induced* to forego the execution by himself of his designs for the benefit of a third person, and to leave the execution to the party deluding him by a *false promise*, and *through such false promise* obtaining title to the property." * * * * "There must have been some fraud, active or passive, in procuring the deed or devise—the mere breach of a promise to convey is not sufficient." * * * * "If A voluntarily conveys land to B, the latter having taken no measures to procure the conveyance, but accepting it, and verbally promises to hold the property in trust for C, the case falls within the statute, and chancery will not enforce the promise."

Lantry v. *Lantry*, 51 Ill. 458.
Brown on Frauds, Secs. 94, 95, 437.
Walker v. *Hill*, 21 N. J. Eq. 202,
Perry on Trusts, sec. 181.

Hoge v. *Hoge*, 1 Watts, 213.
2 Pomeroy's Eq. Juris., sec. 1044.

So, in this case, if Mrs. Moore, without having herself taken any steps to secure the conveyance, had accepted the title, verbally promising to hold it for Moore, the case would fall within the statute, and the promise be absolutely void (p. 19).

Moore could have said to McKay and McDonald, "You keep the land, and you can do as much for me sometime." Would the complainants claim in such case that they could obtain the title from McKay and McDonald? And yet, if they base their claim to relief upon the fraud of Moore, would not the fraud be as great in this case as when he said "convey to my wife?" If it was the fraud of Moore which raised a constructive trust in favor of complainants, why would it not affect the title in McKay and McDonald's hands, with full notice, as well as in the hands of his wife?

It was no more a fraud upon the part of Moore, than it would have been to have refused to pay his promissory note, or carry out any other civil contract; the deed was but a civil contract, and in equity it is only considered as an agreement to convey the legal title *when he should thereafter acquire it*. He cannot be compelled to obtain title. It is only *when he has acquired the legal title* that he can be estopped at law, or required to convey in equity. The grantee has no equities in the land, and has no equities in the money used to purchase the land, and so long as he does not obtain the legal title, or an enforceable right to the legal title, the land cannot be reached

through his warranty deed. He has no interest in the land after the conveyance more than before. While creditors might, if they could trace his money into the land, reach it in the hands of a purchaser with notice, it would be because the purchase money was really a trust fund belonging to the creditors, and they simply follow the fund into the real estate.

We insist that no amount of fraud upon the part of Moore could have the effect to incumber the title in the hands of McKay and McDonald, who were the sole absolute owners in fee, and there being no trust impressed upon the lands while they held the title, Moore occupied no position toward the land, nor had any interest therein, whereby it was in his power to impress any trust upon the land, or charge it with any equities, or prevent McKay and McDonald from transferring to their grantee just as complete and perfect a title as they themselves possessed.

It would be a strange and new doctrine indeed, if a person who held a perfect title to a piece of land could be deprived thereof by the fraud of a third person, who had no estate or interest therein, or be deprived of the right of conveying to whomsoever he pleased.

As is said in 1 Wash. on Real Prop., p. 67, "One of the most important incidents to a fee simple estate, is the right of *free and unlimited alienation.*"

But it is said that if Mrs. Moore had bought the land without the consent of her husband, although with full notice of all facts, her title would have been absolute. (*Peckham* v. *Balch*, 49 Mich., 149).

Yet it is claimed, that, inasmuch as she took the title at the request of her husband, that amounted to carrying out the original void parol understanding, and having been carried out, the same would be valid.

If the original understanding was carried out by that transfer, then that must have been a part of the original understanding, and, if so, no fault can be found therewith, because it would be according to agreement.

But complainants figure this matter down to a fine point and say that the original arrangement was *almost* carried out, and that right here is where the fraud of Moore comes in, which lays the foundation of their claim for relief.

That Moore induced McKay and McDonald to carry out an indefinite understanding, which was absolutely void at law and equity, and in which no one had any equities or equitable interest in a different way, and not according to said original void understanding or agreement.

That while neither Moore nor the complainants had any right in equity to insist that it should be carried out in any different method, or, in fact, no right to insist that it should be carried out at all, because they, neither of them, had any equities in the property conveyed, yet, because McKay and McDonald conveyed to Mrs. Moore at Moore's request voluntarily, when under no obligations to convey to any one, and thereby transferred property in which neither complainants nor Moore had any interest, that by reason thereof, a constructive trust arose, and Mrs. Moore had no rights in the

property. That the carrying out of the void parol contract in any other manner than first agreed upon is a fraud upon the rights of complainants, who never had any rights to be defrauded of, who had no standing in equity to have the agreement carried out in any way. And yet this is the whole basis of the claim for relief in this case. But no fraud of Moore could give complainants a title which they did not previously possess.

As was said in *Glass* v. *Hulbert*, 103 Mass. 37 and 38, "While it is true that fraud may vitiate a writing which is tainted with it, and may destroy a title acquired by its means, it has no creative force. *It will not confer a title.*"

Again, a fraud to be actionable, must defraud some one—must deprive them of some rights. But when it is conceded that Monroe had no rights, no equities in the land of any kind or nature, how can it be said that he is defrauded by a conveyance of the land to Mrs. Moore? He had no right in the land; the owners had the unquestioned right to convey to whomsoever they wished. Hence Monroe was not defrauded of any rights in the land.

See Bigelow on Law of Frauds, p. 13, ¶ 1.

A person must be defrauded of legal rights before he can be heard to complain in the courts.

If it were a fraud upon the part of Moore, it could only be shown by first proving some agreement whereby the land was to be conveyed to him. This, we have shown has not been done. But complainants nevertheless rely upon the alleged agreement, which was void, and then charge fraud because not executed as they would have desired.

"To prove the fraud by the agreement, and then give effect to the agreement on the ground of fraud, is obviously reasoning in a vicious circle."

L. Cases in Eq. vol. 2, ¶1, p. 556.

"A contract void under the statute of frauds is a mere nullity and cannot be used for any purpose."

Scott v. *Bush*, 26 Mich. 421.
Raub v. *Smith*, 61 Mich. 543.
Gloss v. *Hulbert*, 102 Mass. 24.

"A contract void by the statute of frauds cannot be enforced directly or collaterally.".

Dung v. *Parker*, 52 N. Y. 494.
Dumphey v. *Ryan*, 116 U. S. 491.

If the proof of such a contract is essential to maintain the action, whatever its form, there can be no recovery. *Ib.*

In *Glass* v. *Hulbert*, (cited ante) it was distinctly held in a very elaborate opinion, that the rule that "the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor", "applies as well to the enforcement of such an agreement by way of rectifying a deed, as to a direct suit for its specific performance." (p. 43).

This is in conformity to the foregoing decisions, that such a contract, void under the statute, cannot be enforced directly or *collaterally*.

To rectify the conveyance in the case referred to, through the evidence of a void parol contract, *would have been to enforce that void coutract to that extent*, and to recognize it as valid for that purpose.

So in the case at bar, if there had been a complete parol contract, but void under the statute, and had the conveyance to Helen Moore been made

in consequence thereof, for the court to decree that under such void contract the conveyance ought to have been made to Nat. D. Moore instead of Helen, and thereupon decree that she convey to complainants, is tantamount to enforcing a void contract in a different method from which the parties have executed their mere honorable obligation, and such decree must be founded upon the terms of the alleged void parol contract, although its terms were not admissible in evidence for any purpose; and this case stands to-day in the eye of a court of equity, just the same as though this inadmissible and incompetent evidence of a parol contract was stricken wholly from the record. It was incompetent for any purpose.

It is, however, quite incorrect and misleading to speak of the void parol contract in this case. The fact is, as found by the court, there was *no contract whatever*, nothing but an indefinite understanding, "that McKay and McDonald would do what was right in the matter." When, therefore, complainants speak about the original contract being carried out, it is incorrect. There was nothing which a court of law or equity would or could recognize as rising to the dignity of a contract. All evidence upon the subject of this indefinite understanding was, of course, incompetent. With that stricken out from all consideration in the case, as it must be, there is nothing left upon which to construct this fine spun theory of the carrying out of the original understanding.

It is quite too common, because testimony is taken and forms a part of the record (as all testi-

mony offered must be taken in equity), to consider it, regardless of its inadmissability and incompetency.

Here is where the court below was evidently misled.

He first finds, as a matter of fact, that there was no contract, which could have been enforced, even regardless of the statute of frauds, and then later on speaks of McKay and McDonald waiving the statute of frauds, by conveying to Mrs. Moore.

He seemed to have the impression that because McKay and McDonald conveyed to Mrs Moore, because of the indefinite "mutual understanding that McKay and McDonald would do what was right," that was a waiver of the statute, and made the "mutual understanding" a valid contract.

This is wholly incorrect. The voluntary execution of the deed is valid and binding, but the void contract, if there had been one, is still void for all purposes. If parties see fit to execute a void contract, the courts will recognize such voluntary execution, as executed, but the contract is still as a contract, void for all purposes, and inadmissible in evidence.

In accordance with this doctrine it has been held, that where a contract, void under the statute, has been executed upon one side, and the other party has received and accepted the money, property, services or benefit resulting to him from such performance, an action will lie against him for the value thereof, *not upon the contract*, as that is void for every purpose, but upon the common counts in assumpsit.

Scott v. *Bush*, 26 Mich. 418.
Sutton v. *Rowley*, 44 Mich. 112.
Liddle v. *Needham*, 39 Mich. 147.

If it is the execution of the contract which makes it valid, it must be valid *as executed*; it could not be enforced in equity at all, and hence, in whatever method it is carried out it must stand, as courts of equity never undertake to compel a person to execute a purely voluntary contract in any other or different way from which he has seen fit, as a mere matter of honor, to execute it. In other words, there is nothing for a court to lay hold of in a purely voluntary matter, and the court therefore always leaves the parties where they have placed themselves, whether executed or unexecuted. And the court has no authority or jurisdiction to require a person to execute a purely voluntary matter in a different way than he intended, by changing the direction of the title after conveyance, which would amount to the same thing, in effect, as though originally compelled to be so carried out, and would amount to saying to a person something like the following:

"While this court cannot compel you to carry out your void parol agreement, and while you may do just as you please in the matter, yet if you do voluntarily convey the property in question, this court will put the title where you could not have been compelled to have placed it and will take it away from your grantee, to whom you had an absolute and unqualified right to convey, just exactly as you did."

So, if a person under no other obligation than

a purely moral one, should convey a tenth part instead of carrying out the full extent of the moral obligation, no court would think of compelling him to convey the other nine-tenths, because there would be no legal or equitable obligation to do so; and so if he should convey to John Doe instead of Richard Roe, the court would be equally powerless to change the conveyance or benefaction, or interfere with the conveyance as made.

Because the right to interfere with it must be based upon some contract relation, enforcible in equity, whereby equities have been attached to the property conveyed, or been impressed thereon, or eles it must arise in consequence of the violation of some fiduciary relation or trust, recognized by a court of equity, existing between the parties either legally or equitably interested in the title to the property *at the time of the transfer*.

But in this case the grantors held the absolute title in fee, and could convey to whomsoever they desired. With such a title they conveyed to Mrs. Moore voluntarily, with the full notice and knowledge of all the facts, without being imposed upon or deceived, with no equities outstanding and with no contract obligations resting upon Mrs. Moore at the time; and under such circumstances it is the universal rule touching the transfer of real estate, that the grantee takes a full and perfect title in fee.

And so in *Dung* v. *Parker* (cited ante) the court say: "He cannot say he was defrauded and make that the substantive ground of recovery, because he had no right to rely upon a contract which, when made, the law declared to be void."

"The plaintiff is compelled to make the void contract a part of his case in any form of action he may bring, and the statute stands as a barrier."

"It cannot be enforced, directly or indirectly. The plain intent of the statute is that no person shall be subjected to any liability upon such an agreement."

If there had been therefore, an actual agreement, but void under the statute, whereby Moore was to have an interest in the land, and in pursuance of that agreement a conveyance had been made to Helen Moore voluntarily, no court could disturb the title, where the remedy must be necessarily based upon the existence of such void contract.

Judge Campbell says, in *Scott* v. *Bush*, 26 Mich. 421: "We have held in *Chamberlain* v. *Dow*, 10 Mich. R. 319; *Hall* v. *Soule*, 11 Mich. R. 494; *Holland* v. *Hoyt*, 14 Mich. R. 238; and *Grimes* v. *Van Vechten*, 20 Mich. R. 410; that a contract void under the statute of frauds, is a *mere nullity*, and cannot be used for any purpose whatever."

"And we cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else."

In *Kelly* v. *Kelly*, 48 Mich. 48; the court uses this language: "A contract void under the statute of frauds, cannot be used as the foundation of any legal or equitable right."

Furthermore we say, that there is no principle upon which a court of equity would be authorized to disturb the title in such case, except in behalf

of creditors by virtue of the statute, or in behalf of some one having an equitable estate or interest in the land, which the grantor had no right to cut off.

The whole theory, if it can be called a theory, under which complainants claim relief, is based upon an alleged constructive trust, no express trust being claimed.

"Constructive trusts arise when the legal title to property is obtained by a person *in violation*, express or implied, *of some duty owed* to the one who is *equitably entitled*, and when the property thus obtained is held in hostility to his beneficial rights of ownership."

2 Pom. Eq., sec. 1044.

"Whenever property, real or personal, *which is already impressed with or subject to a trust of any kind*, express or by operation of law, is conveyed transferred or devolves from a trustee to a third person who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property *subject to the same trust which before existed*, and becomes himself a trustee for the original beneficiary. * * * It is sufficient that he acquires property *upon which a trust is in fact impressed*, and that he is not a *bona fide* purchaser for a valuable consideration and without notice."

2 Pom. Eq., sec. 1048.

We submit that a court of equity should ex-

amine this question just as it stands, under the competent evidence in the record.

First, then, after striking out the unproven allegations of the bill, we will have left the allegations: (a) that Moore gave Monroe a deed of land in which he had no title or equitable interest; (b) that subsequently the owners of the land voluntarily conveyed the land to Moore'swife.

This would constitute the entire charge of the bill. It would be wholly immaterial whether the conveyance to Moore's wife was with or without his consent, if he had no interest.

Second, striking out the incompetent evidence of the void "mutual understanding," there would be left: (a) the fact that Moore gave Monroe a deed of the land which he did not own; and (b) that the owners subsequently made a voluntary conveyance of the land to Moore's wife. Not in consequence of any agreement or mutual understanding, because that evidence would be out of the case as wholly incompetent, but merely, that the absolute owners, of their own volition, without any deception or fraud practiced upon them, conveyed the land to Helen Moore.

We insist that the foregoing comprises all there is actually presented to this court, upon which complainants ask a decree that the land be conveyed to them.

"It is a rule that the holder of a good title clothes his grantee with the rights, and conveys to him the same title, which he himself holds."

East v. *Pugh*, 32 N. W. Rep. 310.

It was therefore held in *Peckham* v. *Balch*, 49

Mich. 179, that "The fraud of the defendant Winter in purchasing from Mrs. Balch, cannot make out an otherwise defective case for the complainant. *If he could not have enforced specific performance as against Mrs. Balch, neither can he against her fraudulent grantee.*"

See also *Hutchins* v. *Hutchins*, 7 Hill (N. Y.) 104.

III.

THE SALE BY MOORE TO MONROE OF THE LAND IN QUESTION WAS RESCINDED BY MUTUAL CONSENT. We have already seen from the evidence that Moore had no title or interest in the land when he gave his deed to Monroe, and therefore no interest passed by his deed. The most favorable view in which it can be considered in behalf of complainants (but the correctness of which we do not concede) is that while it was a deed in form, it was in fact, and can only be treated in a court of equity, as a contract to convey, and this contract to convey can only be enforced, if at all, after the grantor shall obtain the title. Because it is only upon the theory that the grantor has obtained the title, which he has the power to convey, and which he is equitably bound to convey, that there is any foundation for relief to the vendee in equity.

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to convey merely, there can be no question that the contract may be abandoned or rescinded, the same as any other contract. This would not be the case if any title had passed by the Moore deed, because under our statute title can only pass by deed, and will not revert by a mere rescission of contract. The written contract, then, between Moore and Monroe, we claim was abandoned, or rescinded by the parties. That this could be done by parol there is no question.

Where a party having a written contract for sale of a piece land, said "he did not want the land and he would as lief Appleby should have it as any other person," held that that was an abandonment and a bar to specific performance.

King v. *Morforford*, 1 Sax. N. J. Eq. 274.

"Equity will not enforce a written agreement for sale of land which has been abandoned by parol, by the party seeking performance."

Maxfield v. *Terry*, 4 Del. Ch. 618.

In the summer of 1876, Mrs. Monroe went to Hancock where her sister, Jane McKay, was residing, and said that her husband had sent her up there to get his note. This was the $240 note which Monroe gave Moore, together with $10 in cash as the purchase price of the land. Mrs. McKay was merely a custodian of the note, and at first objected to giving it to her sister, but her sister's tears, coupled with the statement that Moore had no title to the land, and that it was probably worthless anyway, finally induced Mrs. McKay, after consulting with her husband, to give up the note. "Mrs. Mon-

roe then claimed, now that she had got the note, they were square and Mr. Moore could keep his land." See Jane McKay's testimony, Rec. pp. 27 and 28 and John McKay's, p. 33.

John McKay testifies that Mrs. Monroe said her husband had sent her up after the note he had given Mr. Moore; that he way very busy at the time and couldn't come: that she could go to Calumet and make a visit to her father and mother, and carry the note back when she went home. Witness then gives a detailed statement of the whole occurrence (Rec. p. 33).

Mrs. Monroe, (now Mrs. Crawford, one of the complainants,) produces the note in court, and it is made an exhibit (Rec. p. 76). She contradicts both Jane McKay (her sister) and John McKay, at almost every point of their testimony, and tells a strange and unreasonable story (Rec. p. 69.) which the court below finds "manifestly unreliable" (Rec. p. 131).

She testifies that she did not know what the note was given for, nor know of its existence until she saw it at McKay's.

That she took it home; that she showed it to her husband when she first got home; that her husband did not even tell her what it was given for; neither did she ask him; that he gave no instructions about it, "nothing more than he said to put it by." Whereupon she says: "I put it in the drawer where we kept our papers then."

McDonald testifies (Rec. p. 30) that he had a conversation with Monroe in June or July, 1876, in which Monroe said he did not want the land, it was

not worth a cent anyway, and *he wouldn't have it.* That he wanted to get what Moore owed him.

William D. McIntyre, a brother of Mrs. Monroe, testifies (Rec. pp. 83-85) that he was living at his father's in the spring of 1878 in the Province of Ontario, Canada, when John Monroe and his wife came there to live. That while they were there he heard it talked over in the family at different times, that they had got back the note they had given to Moore as part of the purchase price of the land in question; that Moore told his father about it; that "the whole family was present".

"Nat. D. Moore testifies (Rec. p. 30.) that in August or September, he thinks 1876, Monroe came to see him; that in that conversation Monroe said he didn't want the land. He didn't think it was of any account anyway; that he had been talking with McDonald and McDonald told him he was not sure that Moore would ever have a deed. Moore told him that the note he gave him was in the possession of Mr. or Mrs. McKay. Monroe replied that he knew that; that he could get the note from them and would send back Moore's deed; that he had not had it recorded. Moore replied that was all right. He waited until Moore got through his work at six o'clock, then they went to Negaunee to close up the matter. Monroe said: I gave you $150 to enter the lands, and $10 on the other land, (meaning the land that he bought from Moore) and he said: "If you give me your note for $160, I won't charge you any interest for the time you had the money." Moore says he did so.

Some months after that Monroe went to Ishpe-

ming and asked Moore if he could pay him anything. Moore informed him that he had been unable to work for about three months, owing to an accident from an explosion; that he had only been at work for a short time and was paying up some debts made while he was sick, but if he would take an order on the Iron Cliff's store for twenty dollars he would give him one. Monroe replied that the order was just as good to him as the money, as he had to buy provisions for his house anyway" (Rec. p. 38). Moore gave him the order. That was the first payment on the $160 note. He promised to give him other orders as he could, and did so down to the time that Monroe moved away to Canada, leaving the note for collection in the hands of a justice of the peace at Ishpeming by the name of Hanson. Moore made small payments to Hanson, aggregating forty or fifty dollars, and subsequently, in the summer of 1881, paid the remainder due on the note with interest at ten per cent., amounting in all to $60, to Mrs. Monroe.

Did Monroe send his wife for the note?

If he did that certainly ends the case. Let us see.

That she said her husband sent her for the note is not open to doubt. It is positively testified to by John McKay, and by Mrs. Monroe's sister, Jane McKay, both wholly disinterested witnesses. The theory that he did send for the note is certainly greatly strengthened, if need be, by the fact that the note was shown him, and he merely told his wife "to put it by," as a matter of course, expressing no surprise, asking no questions, but con-

ducting himself in exactly the same way that any person would who thoroughly understood the transaction. It is strengthened by the testimony of Mrs. Monroe's brother, William D. McIntyre, who testifies that it was talked over repeatedly in their family in Canada in the spring of 1878, when Monroe and his wife were living there, that they had got back the note given to Moore for the land. It is strengthened by the fact that it was in harmony with Monroe's views as expressed to McDonald, that he did not want the land and that he wouldn't have it. It is strengthened by the fact that Monroe knowingly and voluntarily retained the note while he remained in this country, being for a period of nearly two years, and then took it with him when he removed to Canada, and kept it until his death. It is strengthened by the fact that Monroe had correspondence with John McKay and a personal interview with McDonald, with reference to the matter, and was informed that there was nothing certain about when Moore would have a deed to the land. Finally, it is strengthened by the testimony of Moore that there was an express agreement of rescission, one of the terms of which was that Monroe might get the note from McKays.

We submit, therefore, that the conclusion is irresistible that Monroe sent his wife for the note, and that she obtained it and gave it to him, and by his direction it was put away among their papers. When considered in the light of defendants' proofs, that it was delivered up and received as an abandonment and rescission of the sale of the land, then everything seems in harmony, and all the actions

of the parties upon either side are consistent and natural. It is then fully explained why Monroe expressed no surprise at seeing the note in his wife's possession and by him directed to be put away among their papers; that no inquiry or demand for the note was ever afterwards made by Moore, or any other person; that Monroe never became uneasy about the title to the land; never afterwards made inquiry of McKay or McDonald as to the prospect of Moore perfecting his title; that he never afterwards made any move whatever or took any steps to perfect his title while he lived, and never offered to pay his note to any one. Then, also, is it in full harmony with the testimony of Moore, McKay, Mrs. McKay and McDonald; in harmony with the unquestioned preponderance of evidence; in harmony with the natural course of such transactions, and consistent with the defendants' theory of defense, and the only theory upon which the weight of evidence can be harmonized. It is, indeed, the only reasonable theory upon which the evidence of complainants can be made consistent and the actions of Monroe himself be intelligently explained.

For more than five years after this rescission and the obtaining of the note by Monroe, nothing was heard of the note, and no pretense is put forth by Monroe or his heirs of any claim or interest in the land. In fact, the first we hear of the deed and of complainants' claim under it, after the rescission, is in the conversation between Mrs. Crawford and John McKay (Rec. pp. 24 and 25). This was in the summer of 1881. Mrs. Monroe returned to Canada and wrote McKay one or two letters. He replied

that he thought she had no right to the property, because she had got the note back; and heard nothing more from her until after her marriage to Crawford, when they both came to McKay's house in Hancock.

We quote the following from McKay's testimony.

"She said Mr. Moore was giving her a bad deal on that land interest of hers. I asked her how that was, and she allowed he wouldn't give it to her. So I told her I didn't consider she had any right to it, as I wrote her before; that she had got her note back and I didn't consider she had any right to it at all. She admitted getting the note back, and said that Mr. Moore had plenty of property without this piece and it would serve him right to get beat out of it."

When Moore paid Mrs. Monroe the balance due upon his note, she made no claim whatever to the land, to him. She gives in her testimony as an excuse for saying nothing to Moore (Rec. p. 64) that "McKay said there was a back tax upon the land, and he supposed Mr. Moore would look to me for my part of the taxes; that McKay said it would be time enough to speak of my interest when it would be sure the property was proven up as they could wish it to." She pretends that she decided upon this through the advice of McKay, but she is squarely contradicted by McKay, who says he told her she knew she had no claim to the land, as she had got the note back and had never paid a cent for it.

That Monroe obtained the note is certain.

It is equally certain that it was in conformity to

his expressed wish to McDonald and to Moore; that it was obtained by one who occupied the closest of confidential relations with him, and who, presumably, had a common interest with Monroe in the matter, and there is no escape from the conclusion that he either obtained it in pursuance of his agreement for rescission, or that he obtained it in pursuance of his own decision to rescind, and it matters not which; in either case the sale was rescinded and for years afterwards fully acquiesced in by Moore, who was informed by McKay of the fact that the note had been obtained by Monroe through his wife.

The intention of a party to waive the performance of, or rescind a contract, is to be determined by his language and by his conduct and not by his secret understanding. As said by the court in *Russell* v. *Miller*, 26 Mich. 21, "The acts of the parties are stronger than their words, even when freshly reported."

And it should not be forgotten in this case that nearly six years elapsed after Monroe obtained his note and rescinded the contract before this bill was filed.

"Any circumstances or course of conduct, from whence can be clearly deduced an agreement to put an end to the original contract, will amount to a rescission of it."

Fry on Spec. Perf., 406.

If the purchaser abandons the contract because the vendor has no title or cannot fulfill it, a trust ceases.

Perry on Trusts, sec. 231.

What other possible conclusion could Moore have arrived at, even if he had had no agreement of rescission with Monroe, but that Monroe had concluded to rescind, when he obtained his note from McKay and carried it away with him when he went to Canada?

"It is a settled principle that whatever the actual intention may have been upon the part of a person to a transaction, if he so conducts himself in regard thereto as to lead a reasonable person to believe that he understands and assents to the transaction, he is precluded from asserting the contrary and is bound."

Truesdail v. *Ward*, 24 Mich. 465.
Peake v. *Thomas*, 39 Mich. 589.

See also *Fitch* v. *Conyne*, 63 Ill. 83, which was a case where the grantor owned the legal title and had actually conveyed the same, but subsequently the grantee concluded to rescind, to which the grantor consented and surrendered up the note given for the purchase price. The court held that as he had received back his note he was bound in equity to re-convey the title.

"Nor need the purpose of rescinding be expressly declared by the one party in order to give the other the right of consenting and so rescinding. There may be many acts from which the opposite party *has a right to infer that the purty doing that would rescind.*"

2 Parsons on Contracts, 191.

If Monroe did not send and obtain the note under his agreement with Moore for rescission, for what purpose did he obtain it? What legal or

equitable right would he have had to get back his own note and retain it without payment, except that he had rescinded the contract of sale? He had a right to rescind without any agreement with Moore therefor. Moore had given him a deed of land he did not own and was unable or had failed to obtain title. Monroe's note therefore was given without consideration, and he had a right to its return.

Thus it will be seen that Monroe received back the entire consideration for the price of the land, all of which, with the exception of ten dollars in money, was represented by the $240 note. The $10 paid to Moore, in cash, at the time of the purchase, was put into and formed a part of the $160 note which Moore gave to Monroe at Negaunee, on the night of their completion of the rescission of the sale, a considerable portion of which note was paid direct to Monroe in his lifetime, and the remainder subsequently all paid. So that, when these complainants come into the court of equity asking for this land, they come without having paid a solitary penny therefore, and without tendering or offering to pay. They come with nothing but an old deed of complainant's, from one having no title, seeking and asking a court of equity to wrest a valuable piece of property from the lawful owner and bestow it upon them without consideration.

A clearer case of rescission and concerning which there is so little conflict of testimony, is rarely seen.

But inasmuch as the court below found against

the fact of rescission, and as the opinion forms a part of the record here, we purpose to examine it upon this point in connection with the testimony and the law applicable thereto.

The learned judge had no difficulty in finding that the entire consideration for the purchase of this land had been received back by Monroe and that nothing has ever been paid for the land. He found it possible, however, to find against the rescission of the sale.

First, by discarding and throwing entirely out of the case all of Moore's testimony on that point, and

Second, by holding that inasmuch as McKay delivered the note to Monroe's wife, without any authority from Moore, "He (Moore) could not by ratification make their surrender, his surrender, because they not only had no authority from him, but they did not even profess to act for him."

First, then, as to the entire rejection of Moore's testimony.

The court arrives at such a determination after first pointing out certain things in the case, which, when all combined, the court says "The entire series of these transactions has an ugly look, suggesting that Moore had no idea of giving up the note, nor to pay "Monroe what he owed him, and that the story of the agreement of rescission was an afterthought, coined when Monroe was in his grave and could not deny it."

Let us therefore examine this series of arraignments against Moore's testimony.

(a) The court finds that Moore paid nothing di-

rect to Monroe on the $160 note. (See opinion, Rec. p. 140.)

(b) That it "matured and was unpaid and Monroe left it with a magistrate for collection, to whom Moore paid small sums from time to time, amounting to about $60.

(c) That he "paid nothing more until the summer of 1882 or 1883, when the land had been sufficiently developed to make its very great value apparent."

(d) That Moore, when he took up the note, paid Mrs. Monroe something extra, by way of interest, although, according to his own testimony, the note was without interest.

And then the court argues: "He may have thought the situation reasonably safe and yet that it was politic to pay the balance due on the $160 note, with something extra by way of interest, so that Mrs. Monroe would return to Canada and leave him and Mrs. Moore undisturbed."

The conclusion of the court thereupon is that "The entire series of these transactions has an ugly look," and therefore Moore's testimony is rejected. and the finding is that no agreement of rescission was made.

Now, as a matter of fact, not a single date or statement of fact in either of the foregoing paragraphs (a) (b) (c) and (d) is correct, nor is there a word of testimony in the record to support them.

When Moore made the final payment on the note to Mrs. Monroe with ten per cent interest, it amounted to about $60 (Rec. p. 72).

That this was paid in the summer of 1881 is posi-

tively testified to by both Jane and John McKay on pages 20 and 24 respectively, and no one testifies to the contrary. Besides, all the facts in the case show that they are not mistaken. It was the summer before Mrs. Monroe's marriage to Crawford, and while she was living in Canada. Her marriage was in the fall of 1881 (see her testimony Rec. p. 65). She moved back from Canada to Hancock, Mich., "early in the year 1882" (Rec. p. 70).

The bill in this case was filed in February, 1882, and all the testimony is that the note was fully paid up the summer before the commencement of suit. Indeed, the court finds that Moore thought it politic to pay the note, so that Mrs. Monroe would return to Canada and leave him and Mrs. Moore undisturbed. He finds that "Mrs. Monroe was then living in Canada" (Rec. p. 141). While it conclusively appears from the evidence and from the bill, that Mrs. Monroe was living in Michigan when the bill was filed, in February, 1882.

The court therefore was in error when he fixed the final payment of the note in the summer of 1883 or the year before.

The exact time would be a trivial matter in itself, were it not that the court fixes it in the summer of 1882 or 1883, and then charges Moore with having waited until that time "when the land had been sufficiently developed to make its very great value apparent," while the fact is he made the final payment in the summer of 1881, and all the testimony is that no such developements were made until the spring of 1882. See McDonald's testimony, p. 32; McKay's testimony, p. 24; and Moore's testimony, p. 40.

But to show conclusively how mistaken the learned Judge was, and how unjust his criticisms of Moore (unknowingly) were, when he says that the entire series of these transactions suggest that Moore did not intend to pay Monroe, and that he had no intention of giving up his note, until the great value of the property was shown, we refer to the fact that the deed to Helen Moore by McDonald and McKay, made with Moore's consent or acquiescence, was executed and delivered on the 16th day of December, 1880. This was clearly before any value had been developed, according to all the testimony.

In fact, it appears by McKay's testimony (Rec. p. 24) that the outcrop which was supposed to be on this section 16, when the land was bought from the state, was found, when the lines were subsequently run, to be in fact on the adjoining section 15. He then says, "No good ore was known to be on it until the Cambria Company went in to explore. I think this will be four years next May." That would be May, 1881, when the Cambria Company commenced to explore. Witness' continues: "Up to that time we had no knowledge of any particular value to it."

Q. "When was it sufficiently explored to show that it had large value for iron ore?"

A. "This was in March or April 1882 as near as I can recollect."

"Mrs. Monroe showed me her husband's deed from Moore when she was at my place three years ago—three years ago last summer, as near as I can remember. She claimed she had a deed for the

property and thought she could get it. * * * The Cambria Company was then exploring, and it was reported they had struck ore, but it was not known what it amounted to."

It will be seen therefore that no developments had been made showing value, and even the out crop was known to be on an adjoining section, when the deed was made to Helen Moore, but on the contrary when Mrs. Crawford first made her pretended claim under the deed, a reported find of ore by the exploring company had been made. It is clear, therefore, that on the 16th of December, 1880, if not before, Moore certainly had no intention of still holding on to the note, after the land had been deeded to his wife. Moore must have decided then upon the execution of the deed to his wife, if never before, to acquiese in the rescission by Monroe four years before.

And yet this was, as we have shown, before any value had been developed.

McKay's testimony is corroborated by McDonald and by Moore (Rec. pp. 32 and 40), so that it is inaccurate and unjust, to say that Moore had no intention of giving up the note, until after the great value of the land had been shown.

But such a charge will very well apply to the complainants, who for five years never hint at a claim to the land, nor until it was reported that the Cambria company had struck ore, when for the first time Mrs. Crawford, the leading complainant here, conceived the idea, although personally knowing of the fact of recission, of using that old deed to rob Helen Moore, and her infant son now surviving her,

of this piece of land, because it was known to be valuable.

It is a bold, dishonest and rascally undertaking upon her part, to which she substantially confessed in her sister's family at Hancock, when she admitted she had got back the note, but "that Moore had plenty of property without this piece and it would serve him right to get beat out of it" (Rec. p. 26).

Honest John McKay had a sense of justice, right and equity, when he told Mrs. Monroe that she knew she had got the note back and had no right to the property (Rec. p. 25).

There was nothing in this case on which to build the charge that Moore did not intend to give up the note. He never said so; never made a claim to it in any shape, from the day of the rescission in 1876 to the present. He found no fault with its being obtained by Monroe, and years after carried away to Canada; there is not a word from him, not an act which tends to give color even to the charge of the court against Moore's integrity or consistency in this case, "that he had no disposition to give up the note". How Moore ever could expect to hold on to the note, which had been surrendered up for more than five years, which had been taken out of this country and presumably destroyed, and the existence of which he certainly had no knowledge, is a problem to us.

Now, if the whole amount of principal and interest (at ten per cent.) due on the note in the summer of 1881, was $60, and such is the uncontradicted testimony in the case, then it is a plain calculation that there could have been only about $45 un-

paid on the note when Monroe died in the summer of 1878.

It is plain therefore, that at least $115 of principal, besides ten per cent interest, was paid by Moore on the $160 note during Monroe's lifetime, and the principal part of this must have been paid direct to Monroe himself, as Moore paid the justice only $40 or $59, while Mrs. Crawford says Moore only paid the justice $11, which would leave a much larger sum, paid to Monroe personally.

Lastly, the court finds that according to Moore's "own testimony, the note was without interest".

Moore testifies (Rec. p. 38) that Monroe said to him: "If you give me your note for $160, I wont charge you any interest *for the time you have had the money.*"

On cross-examination Mr. Moore is asked (Rec. p. 49):

"Did you ever pay that $10 back as an independent sum?" He replied: "No, sir, I did not; it was put in the note of $160. He said he would not charge any interest," meaning, as he had testified fully on direct examination, any interest for the time he had had the money. No other fair construction can be placed upon his testimony. Moore had had $150 paid him by Monroe with which to enter some land, which was afterwards found to be already entered by some one else, and he had also the $10 cash paid him on the purchase of the land in question, when he obtained Monroe's note for $240. And Monroe said to him in their rescission agreement, now if you will give me your note for the $150 and for the $10, I will not charge you "any

interest for the time you have had the money," but will make the note an even $160, and that was the amount for which the note was given, showing that no interest was charged for the time Moore had the money. Whether the $160 note was payable on demand or not, none of the witnesses can remember, and there is therefore no evidence when it became due. There is no pretense by Mrs. Crawford that Moore paid her anything more than was owing on the note, as figured up at the time. Nor does Moore claim to have paid her beyond the amount due. There is no evidence as to the rate of interest to the note, save that the presumption is that it was the amount as paid by Moore.

At the time of the payment by Moore, Mrs. Monroe was at John McKay's and told him (Rec. p. 24) that she had "collected the balance of the money due from Moore." She said: "Mr. Moore had acted very gentlemanly with her, and had paid her up all her money with interest."

Not a word that Moore had paid her interest at ten per cent on the note from 1876 to 1881, a period of five years, extra, beyond what the note called for.

The court finds that only $60 was paid during Monroe's life-time and then that Moore paid the remaining $100 to Mrs. Monroe with ten per cent interest for five years, which would amount to $150, while the truth is, under the evidence, Moore only paid Mrs. Monroe $60, including interest.

We have seen, therefore,

1st. That Moore paid more than two-thirds of the $160 note during Monroe's life-time, together

with ten per cent interest thereon, instead of only $60.

2d. That he paid the most of that to Monroe personally while here, instead of only $40 or $50 to the justice after Monroe moved away.

3d. That he made final payment of the note in the summer of 1881, instead of in the summer of 1882 or 1883.

4th. That he did not wait until 1882 or 1883, when the property was shown to be of very great value, but paid in 1881, when no developments showing value had been made.

5th. That he did not pay something extra by way of interest, to induce Mrs. Monroe to go back to Canada and leave him and his wife undisturbed, nor was it paid in 1882 or 1883 (as we have seen) after the property had been proven valuable, but at a time when no more was known of its value than when first located.

"The entire series of these transactions" therefore, if the court had not mistaken the facts, would have been wholly devoid of the "ugly look, suggesting that Moore had no disposition, in Monroe's lifetime to give up the note, nor pay him what he owed him, and that the story of rescission was an afterthought."

On the contrary, the entire series of these transactions shows that Moore was a poor man; that he was seriously injured by an explosion in the Cambria mine, and laid up for three months; that he then commenced paying Monroe as fast as he could; that he paid him at least $60 or $70 personally, besides the interest; that Monroe moved to

Canada, but that Moore kept on paying on the note until he had paid the justice about $50, besides interest, and then made the final payment in full when asked for it by Mrs. Monroe. That he paid the note in full with no further knowledge of the value of the property in this case than when first located; that he did not pay any extra interest to Mrs. Monroe, much less any such payment in order to keep her from asserting her claim to the land.

It would be a strange thing indeed for a man of even limited sense, to think that by paying what he honestly owed on his own promissory note, he would deter, or prevent in any way, the holder of the note from asserting a claim, if it was honest and right, to a piece of valuable land, as the court found this to be in 1882 or 1883, when he finds that Moore paid the note.

Every single thing, therefore, which the court below arrayed against Moore as a reason for discrediting his testimony, is wholly unsupported by the record.

When the premises fail, the conclusion becomes valueless.

With Moore's testimony the rescission is complete.

But strike out his testimony on that point, and the rescission is nevertheless complete.

Monroe had a right to rescind regardless of Moore. When he got back his own note for the $240 and took the $160 note of Moore, the rescission was complete.

Nearly all the testimony in this case was taken ten years after the sale to Monroe, and nine years

after the rescission, and it would be strange if technical criticisms of the testimony could not be made, so far as each witness is concerned. But we submit, that on all the material points, but very little contradiction is found. There is not a single thing that can be pointed out in the entire testimony, on either side, that is not in full harmony with the fact of a rescission of the sale by mutual consent.

The case is one of great importance, considering the amount involved, and we felt that we ought to point out the errors of fact in the opinion of the court below, that we might not seem to concede his statements correct. Had the court not, by some singular inadvertence, been misled as to the facts in the record, he would have had no cause to criticise Moore's testimony, and could not have failed to find the rescission complete.

The second ground upon which the court declines to find a rescission, is a legal one of much technical nicety to be advanced by a court of equity, and one that does not necessarily arise in this case. The court says, because Mr. and Mrs. McKay had no authority to surrender the note, that Moore "could not, by ratification, make their surrender his surrender," as they did not profess to act for him in the transaction.

1st. Whether Moore could ratify or not the act of the McKays, no court in the world, it seems to us, would hold that he might not acquiesce in that act, after knowledge of it was brought home to him and thereby bind both himself and Monroe to the rescission. It was Monroe's act in getting the note

that Moore acquiesced in, and the question of McKay's agency does not arise. If authorities were necessary, those already cited would be ample.

2d. When Moore authorized Monroe to get the note, in rescission of the contract, it amounted in legal effect, to authorizing McKay, if he had it, to deliver the note. It was in effect a verbal order on McKay for the note. But complainants say that Moore thinks it was in August or September of 1876 when he made the agreement of rescission with Monroe, whereas all the testimony shows that Mrs. Monroe obtained the note in July of that year.

To this we reply, first, that it would not be strange that witnesses testifying to a transaction which occurred nine years before, should disagree one or several months concerning such a matter as this; and, second, if it be true, as Moore now thinks it was, after talking with McKay, that Monroe had already obtained the note when they made their agreement of rescission, it did not require a ratification of McKay's act, as the agent of Moore, to make the rescission binding. Moore certainly acquiesced therein, never having to the present time objected to the obtaining of the note, and never having made any claim thereto, but testifies, that he supposed that was a rescission, and an end to the sale (Rec. p. 49).

In any event, when Moore told Monroe it was all right for him to get the note and cancel their bargain, it is quite immaterial in what capacity McKay, assumed to act in delivering it. It is not the act of McKay with which we have to deal, but the act of the party to the rescission; and his act in

getting the note under his talk and agreement with Moore, binds him to the rescission.

After Monroe recovered back the entire consideration, and retained it all these years with the consent and acquiescence of Moore, it seems to us that it is going a long way for a court of equity to now say to the parties, that although they intended and supposed the contract of sale to be rescinded and had acted for years upon that supposition, that it is all a mistake and they are placed back where they were in 1876, because McKay was not previously authorized to surrender the note.

There is another view to be taken upon this question of abandonment or rescission, which, it seems to us, is absolutely conclusive against any rights of Monroe or his heirs, and that, too, wholly outside of Moore's positive testimony of an express rescission. It is this (and we will take the weakest position in behalf of the appellants that the testimony will admit): Monroe having at the least done that which indicated his intention to abandon the sale, and continuing to occupy the same position up to and at the time of his death, his heirs inherited no right to reverse his acts, nor to claim inconsistently therewith.

Monroe obtained his note, kept it nearly two years in this country, and then removed to Canada, taking the note with him, and continued to retain it until his death in the fall of 1878. Now, the court below finds these facts, but says: "Monroe's receipt and retention of this note is not a bar to relief to complainants;" because "it did not relieve him from liability to pay it, nor did it affect Moore's right to collect it," &c. (Rec. p. 141.)

The case of *Patterson* v. *Martz*, 8 Watts 374 (S. C. 34 Am. Dec. 474) is directly in point. The facts were that one Dimmich, owner of a tract of land, entered into a written contract with one Patterson to sell him the land for $1,400, *fifty dollars of which was paid down.* Sometime afterwards, Dimmich sent his son to Patterson with the fifty dollars which he had received from him; but, not finding him at home, he left the money with his brother's wife. Patterson's brother testified that he told his brother that the money had been returned, and that his brother objected to his having received it, but as the money had been borrowed from him in the first place to pay Dimmich, he retained it. Under these facts, Gibson C. J., delivering the opinion of the court, says:

"The plaintiff's *retention* of his deposit, left for him by the vendor at his brother's house, was equivalent to a recovery of it back, *and an unqualified act of rescission*; for had he not acquiesced in the restoration of it, he ought instantly to have tendered the money again to the vendor. These circumstances *show a positive abandonment of the contract.*"

The case at bar is a much stronger one upon the facts, even when we leave out of consideration the testimony of Moore to an express contract of rescission, which is in strict harmony with the undisputed facts.

The act of Monroe in getting back his note and *retaining* it until his death, and the acquiescense of Moore therein, constituted a contract of abandonment as unmistakable as though in express words, and it is but trifling with a court of equity, after

the lapse of six years, to ask that these acts, wholly unexplained upon any other reasonable theory by any evidence in the case, be decreed to be wholly meaningless and disregarded by the court, and that the parties be placed in position wholly contrary to what they have placed themselves, because the land, which was of little known value then, has since become immensely valuable, and it would be very advantageous to complainants to have the court undo what the parties did in abandoning the contract of sale.

What is sought by complainants, under the facts in this case, is contrary, as it appears to us, to the plainest principles of equity, and revolting to one's natural sense of justice and right.

And yet the repeated charge of fraud upon the part of Moore is based entirely upon his acquiescence in the abandonment by Monroe, and his overt act in requesting a deed to his wife, in conformity to his understanding of the rescission of the contract by Monroe.

Complainants' entire theory of this case is built upon this foundationless charge of fraud by Moore.

Monroe took the iniatiatory step in the abandonment by getting back his note for the purchase price; Moore acquiesced, and recognized the act of Monroe as abandoning the contract when he consented that the land he conveyed to his wife, Helen. And because he did this, just what any man would ordinarily have done, and been fully justified in doing under the circumstances, he is charged with a serious fraud, and the only fraud complained of in this case.

While we think we have satisfactorily shown the position of the court as to the liability of the parties at this point of time to be erroneous, let us, nevertheless, for the purpose of examining this view of the case only, admit that the obtaining the note by Monroe and its retention by him until his decease, "did not relieve him from liability," nor affect Moore's right to collect the note, at least during Monroe's lifetime. But can it be fairly questioned that Moore had the right to treat and consider the obtaining and retention of the note as an act of abandonment or rescission. Suppose, to illustrate this point, that Moore had expressly acknowledged his consent and acquiescense in Monroe's act: can there be any doubt that such express acknowledgement would not only have bound him, but Monroe as well? Would not Monroe have been relieved from any liability on his note, and would not Moore's right to collect it have been at an end?

But did not Moore, by his act in requesting or consenting that McKay and McDonald, on the 16th of December, 1880, should convey the land to Helen Moore, do that which spoke as loud and distinctly as any expressed words could, that he accepted the situation, and did not recognize any rights of Monroe or his heirs in the land, especially when taken in connection with his previous continued acquiescense in the rescission. There is no pretense that at this time any developments of value in the land had been made.

But to state the case still stronger for the appellees, suppose Moore never did any overt act in recognition of Monroe's act, but merely quietly

and without a word of disapproval, fully acquiesced therein until the present time, and there is no question but that he did at least that much.

In addition, suppose that Monroe continued to retain the note and acquiesce in that condition of affairs until his death, and certainly he did that, at least. He died in that position—a position indicating that his choice was to retain the note and abandon all rights under his deed.

What right, or authority, we ask, could possibly descend to his heirs, to controvert that option, that choice; or to come into court and say that their ancestor would not have continued, had he lived, to maintain the same position which he had taken in the summer of 1876, and maintained until his death? That was a choice, a right, indeed, upon his part, which his heirs cannot now deny him, nor say he would not have continued to maintain.

Monroe got no title by the deed from Moore. Moore failed to obtain title. From inquiries made by Monroe of McKay and McDonald it seemed uncertain when, if ever, Moore would get a title. Under these circumstances, can it be questiond, as a matter of law, that Monroe was entitled to rescind and get back his note?

As we have said, he exercised that right, and having exercised it, no change occured during his lifetime, but his decease, more than two years afterwards found him occupying the same position as to his abandonment and rescission of the sale from Moore to him.

Now, does it lay with his heirs, to say that he would not have so continued had he lived? What

right, under the laws of descent, descended to them, which enables them to be heard in a court of equity, making a claim squarely adverse to the position held by their ancestor from July, 1876, to August, 1878, when he died.

It would be analogous, in principle, to that class of cases where one of the parties having an option to decide whether he will do one of two things, or carry out some contract, and dies, without having exercised that option, his heirs cannot exercise the option, for the reason, as the courts have held, there would be no way of determining what course the original contractor would have pursued had he lived.

And so in this case, where the original party, Monroe, had exercised that option or right, and so continued in the position of a person who had abandoned the contract, the heirs have inherited no right to reverse that act of his, and the court cannot say he would not have continued to retain and claim the note as an abandonment of the contract, had he lived to the present time.

But Monroe and Moore treated the sale as abandoned, the former as long as he lived, and the latter to the present time, and it would be a singular thing, if the heirs of Monroe could now avoid his acts of abandonment, and by returning the old note, which they have had for the past twelve years, obtain this land which has proven so very valuable.

IV.

Complainants have no Equities.

As we have shown from the record, they have never paid a farthing for this property; they have never been in possession of it; expended nothing in the way of improvements or taxes; never made any claim to it for six or seven years, and until it was shown by exploration to be very valuable; they have never offered, tendered, or expressed a willingness to pay anything; they recovered back the entire consideration in 1876 and still retain it, and have retained it voluntarily and knowingly; they have pursued just such a course as would induce any reasonable person to believe that they had abandoned the contract.

The court below says Monroe had "a strong equity against Moore," but concedes that Monroe had no equities against the land so long as it was retained by McKay and McDonald.

It was a mere personal equity against Moore, if any one knows what that is.

But it will hardly be claimed that this so-called personal equity against Moore was the subject of inheritance, or anything that could pass to the heirs of Monroe.

But the court uses equity without any apparent

reference to its legitimate meaning, but something akin to "moral right" as distinguished from equitable right. He speaks of an "equitable construction" of the pleadings, meaning undoubtedly, a "liberal" construction.

"Equitable primary rights, interests and estates," says Pomeroy in his admirable work on equity, section 146, "may exist in things real and in things personal; in all cases, however, *they are rights in, to, or over the subject matter*, recognized and protected in equity, and are to be distinguished from the so-called 'equities,' a term which, when properly used, denotes simply the right to some remedial remedy administered by courts of equity; the *mere* right to have an instrument reformed or canceled, or to have a security marshaled, and the like, is properly, 'an equity'."

But concede, for the sake of argument, that Monroe had an equity against Moore. It would be personal and follow him, and would terminate at his death. No one would claim that a purely personal equity against Moore would survive against his heirs, so as to prevent their acquiring by purchase or otherwise the property in question, because this equity would not be a right *in, to, or over* the subject matter

We cannot accede to the proposition enunciated in the opinion of the court, when he says: "A deed of conveyance, with covenants of seizin and general warranty of lands to which the grantor has no title, is good in equity as a contract for conveyance, and title afterwards acquired by the grantor inures to the benefit of the grantee, or his heirs."

But we are not aware of a single well considered case in which it has been held that a covenant warranty of title was equivalent to a covenant for further assurance. The covenant for further assurance, usually inserted in English deeds, was resorted to when inserted rather as a means of enforcing specific performance of the grantor's agreement to make a good title than as a suit at law for its breach", and that was the chief object of the covenant.

2 Wash. R. P. 406.

Bouvier's L. D., Title Covenant.

"A covenant of warranty in a deed of grant often operates to create a title by estoppel in the covenantee, although the covenantor when making it, had no estate in the granted premises. In such case, if the warrantor subsequently acquires a title to the premises, it enures by way of estoppel, in favor of his covenantee," but the covenant contains nothing which can be construed into an agreement for further assurance.

A court of equity has no right to make contracts for the parties, but only to enforce those contracts, and covenants which the parties themselves have made.

But equity courts have never held that such a contract was any more sacred, or entitled to any greater consideration in equity, than any other equitable obligation or contract.

If the grantor did not see fit to acquire the legal title, so that it would inure to the grantee, he could not be compelled to do so; he was nevertheless

liable upon his covenants of warranty and seizin, the same as in any other case. And that is all there is of this case, outside of the absolute rescission of the contract. If there had been no rescission, then it would have been the ordinary breach of contract by Moore, and of no higher character than the breach of any other civil contract. The entire cry of fraud throughout this case, is but dust; it does not exist in fact; we speak of fraud in the sense in which courts of equity consider it. Not fraud in morals, as every failure to meet an obligation may be termed that, but a fraud perpetrated upon legal rights.

"A single illustration will suffice," (says Bigelow in his work on the Law of Frauds). "By representations which he knows to be false, A induces B to alter his will, already executed in favor of C. Discovering the facts after B's death, C sues A for fraud. The action cannot be maintained, A having infringed no legal right of C." This is laid down as elementary, in the learned author's definition of fraud, on p. 13, subd. 1.

Monroe had no equitable right against McKay and McDonald to require them to convey the land either to Moore or to himself. He was defrauded of no rights (for he had none) when they conveyed to Helen Moore. He had no equities in the land, consequently his rights or equities were not invaded, nor has he acquired any new equities since.

It is evident from a careful examination of the opinion of the learned judge that he wholly lost sight of the distinction between his own views of the *moral*

law, and that which comes within the scope of juridical action and recognized equitable principles.

"The moral law, as such, is not an element of the human law. Whatever be the name under which it is described—the moral law, the natural law, the principles of right and justice—this code which is undoubtedly compulsory upon all mankind in their personal relations, is not *per se* or *ex proprio vigore* a part of the positive jurisprudence, which, under the name of the muncipal law, each independent state has set for the government of its own body politic. This truth, so simple and so plain, and yet so often forgotten by text writers and judges, removes at once all doubt and difficulty from a clear conception of the positive human law and of its relations with the higher and divine law, which we call morality."

1 Pom. Eq.. sec. 63.

"Equity cannot interfere to give any remedy unless the right in question, the invasion of which constitutes the wrong complained of, is one which comes within the scope of *juridical* action, *juridical* events, rights and duties. The right must belong to the purview of the muncipal law, *must be one which the muncipal law, through some of its departments, recognizes, maintains and protects.* Equity does not attempt, any more than the law, to deal with obligations and corresponding rights which are *purely* moral, which properly and exclusively belong to the tribunal of conscience."

Pom. Eq., sec. 424.

In *Rees* v. *Watertown*, 19 Wall. 121, the court said: A court of equity "cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations."

It will be seen, therefore, that there must be some actual existing interest in the subject matter —such an interest as in equity is treated and considered as an estate, as distinguished from the legal title, to enable one to be heard in a court of equity asking for the legal estate. It must be such an interest as shall have impressed upon the property a trust, which in fact separates the legal from the equitable estate, and that upon the other hand, until a person has acquired such equitable estate he is in no position to complain of the method, manner or way in which the legal estate is held or disposed of, and cannot be heard to complain of being deprived of that to which he had no equitable claim.

The court quotes the equity maxim, that "Equity looks through forms to substance," and then says that equity "will regard this transaction as if McKay and McDonald had conveyed Moore's interest directly to him, and he then had conveyed it, without consideration, to his wife, she having notice,'" &c.

The maxim does not warrant any such conclusion.

1 Pom. Eq., secs. 378–384.

But aside from this, there is a plain inconsistency in the conclusion of the court, that equity will regard this transaction as if McKay and McDonald *had conveyed Moore's* interest directly to him. The inconsistency consists in this, viz: of assuming, as a premise in the conclusion, that Moore had an interest, after having found and distinctly stated that Moore had no interest (Rec. p. 134); that "the arrangement was so loose and indefinite in its terms

that aside from any objection resting on the statute of frauds, it would not have warranted a decree for specific performance."

If a person has no enforcible interest in a piece of land, it is because no equities have attached to the land in his favor, nothing which a court of equity recognizes or will enforce, and consequently in the eye of the court he has no interest or equity whatever.

If Moore had had an equity or interest in the land, then Monroe would have become the assignee of such interest by virtue of Moore's deed to him.

But the Court also finds, on page 141 of the record, that "the defense of laches is not sustained," because, "*Monroe had no equity* which he could enforce, so long as the title to the land remained in McDonald and McKay."

The Court had no difficulty in finding this entire want of equitable interest in Moore, as well as Monroe, and was fully justified by the evidence in such finding.

It is therefore an untrue premise, that Moore had an equitable interest in the land, and the plausibility of the conclusion that equity will treat the transaction "as if McKay and McDonald had conveyed Moore's interest directly to him" is done away with, and the equity maxim that equity looks through forms to substance, becomes wholly inapplicable, as used by the court.

The court below made another singular statement (Rec. p. 138) "that whether by operation of law" * * * "or whether by reason of the fraud perpetrated by her husband and herself against the

heirs of Monroe, equity imposes upon her (Helen Moore) a personal obligation, is immaterial. She is in one predicament or the other".

To be a trustee by "operation of law", or "by reason of fraud perpetrated," is one and the same thing, and not two distinct kinds of trust. Trusts arise in two ways, viz: by express agreement, and by operation of law. And trusts which arise through frauds, are trusts created "by operation of law."

1 Pom. Eq., sec. 155.

The language of the court, therefore, is, that Mrs. Moore is a trustee by operation of law, by reason of the fraud perpetrated by her and her husband against the heirs of Monroe. Yet the court, as we have already seen, finds that Monroe and his heirs had no *equities* in the land to be defrauded of up to the time that McKay and McDonald conveyed to Mrs. Moore. That Moore had no equities in the land, and that Monroe had none.

We have seen, also, that it is the law, that it is an elementary principle inherent in the very definition of fraud, that a person who is not legally or equitably entitled to an estate or interest in lands cannot be defrauded thereof; that "fraud can only be perpetrated upon rights, *i.e.* upon legal rights, (as distinguished from merely moral rights)." "It must concern legal rights (or the equivalent) *in the technical sense of the term.*"

Bigelow on the Law of Fraud, p. 13.

A person must have some legal or equitable interest, *i.e.*, such an interest as is recognized by the courts, and such an one as the courts will take cognizance of for enforcement, before he can acquire

any standing place in equity to complain of having been defrauded of such interest.

This would seem to be self evident, and a maxim of equity jurisprudence.

When, therefore, it is conceded, as it must be, that at the time McKay and McDonald conveyed the land in question to Helen Moore, they held the title absolutely in fee simple, free of any equities or interest of any kind, in behalf of any one, it must follow, a matter of plain reason, that neither Monroe nor his heirs had any equitable estate therein of which they could be defrauded, the entire equitable and legal estate being joined and complete in McKay and McDonald.

V.

THE PLEADINGS.

We shall avoid as far as possible, repeating under this head what we said in regard to the failure of the proofs to sustain the averments of the bill.

The court below, after fairly stating our position relative to the pleadings, and after having found:

1st. That the "alleged trust" of McDonald and McKay in favor of Moore, did not exist;

2d. That McDonald and McKay never executed and delivered the "alleged deed" to Moore;

That the "alleged deed" never having been exe-

cuted and delivered in execution of the "alleged trusts," which did not exist, the "alleged suppression or destruction" thereof by Moore or his wife has not been proved; then says:

"The rule that the proof and the pleadings must correspond is a familiar one, but it is to be applied *equitably*, and not rigidly; especially when it is appealed to on behalf of a party having all the time of the progress of the cause the facts in full possession, and therefore not misled by a pleading which, although inaccurate or mistaken as to some of its details, yet contains averments sufficient to support a claim for the relief prayed for."

What is meant by applying the familiar rule, that the allegations and proofs must correspond, is to be applied "equitably," we do not know. But we do know that the rule is "that every bill must show that the complainant has a right to the relief demanded."

1 Daniel's Ch. Pl. 360.

That it is not only necessary that the substance of the case made by each party should be proved, but "it must be substantially the same case as that which he has stated upon the record."

2 Dan. Ch. Pl. & Pr. 1037, and cases cited;
Cox v. *Cox*, 2 Casey (Penn. St.) 375.

"Courts of equity have uniformly held that the general facts relied upon for relief must be specifically set forth," and where evidence had been taken showing valuable improvements upon the land in controversy, but there was no allegation in the bill with respect to such improvements, it was held

that such evidence could not be considered in the decision of the case.

Bomier v. *Caldwell*, 8 Mich. 463.

"It is wholly immaterial that the evidence discloses a case for relief, unless that evidence is material to the issue raised upon allegations of the bill."

Tilden v. *Streeter*, 46 Mich. 541.
Piatt v. *Vattier*, 9 Pet. (U. S.) 404.
Texas v. *Hardenberg*, 10 Wall. 68.

It is a new rule to us, that a party complainant is not bound to support with proper proofs the case stated by his bill, but may have relief upon an entirely different theory, if the defendant has knowledge of the facts "during the progress of the cause."

Again the court says, after quoting from *Texas* v. *Hardenberg*, 10 Wall. 68, cited by us, "So in this case, the main object of the bill is to enforce the 'alleged trust' by compelling a conveyance from the fraudulent grantee of the trustees."

This reads strangely, when placed beside his finding, that the "alleged trust" did not exist; that McDonald and McKay did not hold in trust for Moore; that the alleged contract was not only void under the statute, but altogether too indefinite for enforcement; that the main object of the bill was for the purpose of compelling a conveyance "from the fraudulent grantee of the trustees," although the court finds that there was no trust; that McDonald and McKay were not trustees, but that their title was absolute; that "Monroe had no equity

which he could enforce so long as the title to the land remained in McDonald and McKay."

But the court decides that "there is enough in the bill and the amendment to warrant relief without reference to the trust."

Let us see. The court says the *main object* of the bill was to enforce the "alleged trust," and that all the allegations in reference thereto have failed to be sustained by the proofs, yet without reference to this main object of the bill, without reference to the allegations relative to this "alleged trust" which is the main object of the bill, the bill nevertheless contains enough to warrant relief; but the court does not undertake to intimate what averments there are left upon which he predicates this statement.

The case of *Texas* v. *Hardenberg* (cited ante) furnishes no possible support for the very loose and indefinite view of the court below.

In that case, while the bill prayed for relief by injunction against receiving payment of the bonds and coupons, and for a decree for delivery of them specifically to the state, there were also according to the opinion of the Chief Justice, "averments and interrogatories *which look to the proceeds*, as well as to the bonds themselves," and he affirmed the well established rule, by saying that "it is undoubtedly true, that no relief can be granted under the general prayer except such as is agreeable to the case made by the bill."

So in the case of *Piatt* v. *Vattier* (cited ante), which was a bill for the conveyance of the legal title of land. Defendant relied upon the statute of

limitations. Complainant claimed the benefit of an exception in the statute, of non-residence from the state, but the non-residence and absence from the state were not charged in the bill. The fact was proven. But the court held it inadmissible, and would not consider the evidence, with no allegation in the bill to support it.

But what was the "alleged trust" which the learned judge declares to have been "the main object of the bill"?

Not, certainly, a trust growing out of the alleged deed to Moore from McKay and McDonald, because there never was such a deed. It could not therefore arise out of the destruction of any such deed, which never existed. Nor could it arise by the deed to Helen Moore, which complainants allege was made (in connection with the suppression of the deed to Moore) for the purpose of "cutting out" complainants' title, as complainants had no title to be cut out, as found by the court.

What then was the trust? What its character, and how did it arise, and when?

It clearly did not arise by virtue of the unproven allegations of the bill; and yet without them there is nothing left which sets forth any trust.

It must be apparent to any one who reads the bill, that the only trust which the pleader had in mind, grew out of and was specifically based upon the alleged trust of McKay and McDonald for Moore, which the bill alleges was fully executed by a conveyance of an one-third interest to Moore by McDonald and McKay, and yet that "alleged trust" and that "alleged conveyance" have not been

proven, but on the contrary have been affirmatively shown never to have had an existence.

With this eliminated from the bill and from the case, as unproven, it must be clear that the case made by the bill has not been proven. It must be equally clear that no other trust appears from any averments in the bill.

The rules of equity pleading require that "the trust should be clearly alleged in the bill, not only in terms, *but all the facts should be set out*, from which the trust is claimed to arise. And the facts in all cases must be proven with great clearness and certainty."

Perry on Trusts, sec. 137.

In conclusion, then, we summarize our position upon the facts and law of this case as follows:

First. Complainants have failed to sustain the alleged trust in McDonald and McKay for Moore.

Second. They have failed to prove the alleged deed from McDonald and McKay to Moore, in execution of said alleged trust.

Third. They have failed to prove the suppression or destruction of said alleged deed to Moore.

Fourth. All that then remains of the bill is, the allegation that Moore gave a deed of land in which he had no legal or equitable interest, nor ever afterwards acquired any interest, but that at his request the absolute owners of the land subsequently conveyed the same to his wife, therefore complainants claim to own it, and ask a decree to that effect.

Fifth. Defendants have shown that the complainants (or Monroe through whom they claim), in the summer of 1876 got back the entire consider-

ation for the deed from Moore to Monroe, and have ever since retained it, never having offered to return it, nor tendered it back, by their bill or otherwise.

Sixth. We have shown an express rescission of the contract of sale from Moore to Monroe, by the uncontradicted testimony of Moore, strongly supported by what Monroe said to McDonald, that he did not want the land, *and would not have it;* supported by the testimony of John McKay and Jane McKay, that Monroe's wife obtained the note, claiming at the time to have been sent by, and to be acting for Monroe; supported by the fact that when his wife brought it home and showed it to him, he merely said "put it by," as though it was expected, and a matter of course; strengthened by the fact that for nearly two years thereafter, and as long as Monroe lived in this country, he kept the note, and never made a move or said a word in relation to the land or the note; moved to Canada, and then went to Colorado, and died in 1878 or 1879, without making any claim whatsoever. Moore's testimony is further supported by W. D. McIntyre (Mrs. Monroe's brother), who said that it was talked over repeatedly in their family in Canada, in the spring of 1878, where Monroe and his wife were stopping, that *they had got back the note given to Moore for the land.* It is strengthened by the production of the note in evidence, after having been continuously in the possession of Monroe, and his widow after his death, for a period of nine years.

Seventh. That as a matter of law it is imma-

terial whether Mrs. Monroe lied at the time, about her husband sending her for the note, and immaterial whether McKay had any authority to deliver the same, so long as it was obtained and shown to Monroe, and its disposition directed by him, and retained by him for years; it placed him in *statu quo* so far as the sale was concerned, and Moore was fully justified in considering it a rescission of the sale, which he testifies he did.

Eighth. While we submit that the evidence of rescission is overwhelming, and in full harmony with all the disinterested testimony of the case,yet, regardless of rescission, Monroe could not thus get back the purchase price and retain it for years, and then without a tender, or even an offer in the bill to perform upon the part of the complainants what, under their own position in the case, would be equitable and just, still have any standing in a court of equity.

Ninth. That whether the obtaining or retaining the note by Monroe during his lifetime, was an absolute abandonment of the sale by him, or only amounted to an expression of an election or intention to abandon, which he might have disavowed by a return of the note, before any express acceptance or sufficient acquiescence by Moore, is now quite immaterial. He had taken the steps and performed the acts indicative of abandonment, and his heirs did not inherit, by the laws of descent, any right to set aside the acts of their ancestor, or claim rights inconsistent therewith.

Tenth. That the grantee of a conveyance of real estate always takes as complete a title, and one

as free from equities, as that possessed by the grantor, where the grantor conveys voluntarily and without any fraud or deception being practiced upon him.

Eleventh. The general facts relied upon for relief in a court of equity must be specifically set forth; proofs are inadmissable and cannot be considered, unless material to the issue raised upon the allegations of the bill, as every bill must show that the complainant has a right to the thing demanded.

Twelfth. Complainants' case is not made out where the evidence is as consistent with the defendants' theory as with complainants'.

Dragoo v. *Dragoo*, 50 Mich., 573.

We submit, therefore, as a matter of common fairness and honesty between the parties, and as a matter of plain equity, that the decree below, should be reversed, and the bill absolutely dismissed.

Moneys Paid Into Court.

It appears by the intervening petitions of the National Exchange Bank, of Milwaukee, that certain moneys accruing as rents and royalties on the one-sixth interest in controversy, have been paid to said bank, under a lease set forth in said petition (Record pp. 112 to 122), in which said intervenor, while indifferent between the parties, prays that such moneys may be paid into court, and that in the final decree, an order be made as to the disposition of such moneys (pp. 115 and 116).

Such order was made by the court below, and in the stipulation for appeal (Record p. 146) it was agreed between the parties that such moneys should be paid into court.

We ask that this court, by its decree, order all such moneys, paid into court under the decree of the circuit court and that stipulation, be paid over to the defendants.

DAN H. BALL,
IRVING D. HANSCOM,
Solicitors for Appellants.

INDEX.

	Pages.
Statement of the Case	1– 8
Questions Involved	8–11
Assignment of Errors	11–13
The Proofs do not Sustain the Bill	13
Testimony Showing no Contract, Parol or Written	16–21
Michigan Statute of Frauds	25–27
No Trust arose in favor of Moore as against McKay and McDonald, as found by the Court below	29
McKay and McDonald the Absolute Owners, free of any equities, when they conveyed to Helen Moore	30–39
A Person not defrauded of Rights cannot Complain	40
A Contract void under the Statute, void for all purposes	41–47
No Constructive Trust arose in this case	47–49
The sale by Moore to Monroe was rescinded	49–59
Errors of fact by Court below	60–70
Monroe's Abandonment of the Contract Ratified by Moore	70–78
Complainants have no Equities	78–86
A Covenant of Warranty in deed not a Contract to Convey	80
Bill of Complaint Insufficient under the Evidence	86–91
Appellants Position Summarized	91–94
Decree for Moneys paid into Court	95

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DEC 22 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888, No. 700.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, Jr., sole heir at law of Helen Moore, deceased, by his Guardian, NATHANIEL D. MOORE, and JOHN McKAY, Administrator of the Estate of Helen Moore, deceased,

Appellants,

against

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLEES

—BY—

T. L. CHADBOURNE.

L. H. BOUTELLE,
of Counsel.

UNITED STATES SUPREME COURT.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, JR, sole heir-at-law of Helen Moore, deceased, by his guardian, Nathaniel D. Moore, and JOHN MCKAY, administrator of the estate of Helen Moore, deceased, *Appellants*,

v.

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE, *Appellees*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

BRIEF.

I.

The bill is filed to compel a conveyance to complainants as heirs of one John Monroe, deceased, of the one undivided sixth part of one hundred and sixty acres of mineral land in Ontonagon county, Michigan.

We submit the following as a statement of facts in the case, introductory to the argument:

1. Defendant Nathaniel D. Moore, located this land on the iron range in Ontonagon county, Michigan, under an agreement with McDonald and McKay, either verbal or written; McDonald and

McKay furnished the money to enter the land at Lansing, Moore took it, went there, paid it, and on January 28th, 1875, received a patent from the State in the name of McDonald and McKay (McDonald's testimony, Record 15).

2. Moore was to have a one-third interest in the land in consideration of having looked up and located it (Moore's testimony, Record 43; McKay's testimony, Record 25; McDonald's testimony, Record 13-15). True, McDonald's testimony is that he was uncertain whether Moore was to have one-third or one-fourth, but he admits that he was to have an interest. Moore swears positively that he was to have a third; McKay says he was to have a third.

W. D. McIntyre, who was present when the money was furnished to Moore to buy the land, testifies that it was then and there agreed that Moore was to have a third interest, and that the agreement was reduced to writing. He says that Moore's interest was agreed upon before drawing the paper. A deed was subsequently partly executed to Moore for a third interest.

Counsel for defendants in his brief (Judge Dillon's brief, page 20) emphasizes McDonald's testimony, namely, "When he (that is, Moore) went out, I told him if he could see anything that would make his eye water, let me know." This was, of course, before the interview testified to by McIntyre. Moore went out, returned, and reported this land to McDonald. Then McDonald, McKay, Moore and McIntyre met at a hotel in Hancock, and it was there agreed that McDonald and McKay

should furnish the money to enter the land, and that Moore should have a third interest therein.

3. Moore informed Monroe at the time he gave him the deed for a one-sixth interest, that he had arranged with McDonald and McKay for a one-third interest in the same, and that a deed was probably then made out (Moore's testimony, Record 37, 44).

4. Pursuant to this agreement, verbal or written, McDonald and McKay, some time in 1875, had a deed made out to Moore for a one-third interest, this deed was signed by McKay, by McDonald and probably by McDonald's wife, but not by McKay's wife. It was never delivered to Moore, but was deposited with one Viele, to be delivered whenever they should direct. They never directed its delivery, and the deed was lost (McDonald's testimony, Record 13, McKay's testimony, Record 22, 23, 25 and 26, Mrs. McKay's testimony, Record 19, 20 and 21). The reason that the deed was not delivered to Moore was, that there was some unsettled business matters between them, and Moore entirely disconnected with this transaction, which were finally arranged, and after such arrangement McDonald and McKay and their wives were willing and ready to deed to Moore (McDonald's testimony, Record 31, 33 and 35.)

Matters were satisfactorily arranged between Moore and McDonald and McKay, and the latter and their wives were ready to deed to Moore in the year 1877. (It does not distinctly appear at what precise time Mrs. McKay was ready to sign, but this we think immaterial.)

5. McDonald and McKay never denied Moore's right to this interest; on the contrary they always admitted his right to it. It was understood that Moore should have a deed whenever he called for it (McDonald's testimony, Record 31).

6. At Moore's request, on December 16th, 1880. Monroe having deceased in August, 1878, McDonald and McKay, who were then ready to make a conveyance to Moore under their agreement, conveyed the land by deed to his wife, Helen Moore. she paid nothing and had full knowledge of the deed to Monroe. The purpose of the deed to her was to defeat Moore's deed to Monroe, and she knew it. The sole consideration for the deed to her was the original agreement above mentioned between McDonald and McKay on the one side and her husband on the other. The deed to her was made in pursuance of that agreement and in consequence of no other arrangement or consideration (McKay's testimony, Record 20; McDonald's testimony, Record 34 and 14; Moore's testimony, Record 44, 45 and 104).

7. Moore requested the deed to be made to his wife for the express purpose of defeating the deed to Monroe. He says: "That is exactly the reason" (Record 45).

8. Since the deed to Helen Moore, defendant, N. B. Moore has substantially managed the property as if it were his own (Moore's testimony, Record 105, 106 and 107).

A more exhaustive statement of facts is not here deemed necessary, since other facts are stated in the course of this argument.

II.

We submit, that in consequence of the facts appearing in this case, and above detailed, there is an enforceable trust against Helen Moore in favor of complainants as to one-half of the interest conveyed to her, which half was included in the deed from Moore to Monroe.

N. D. Moore had the promise of a conveyance of a third interest from McDonald and McKay, who held the legal title; this they were ready and willing at all times to convey to him, McDonald refusing or neglecting, it is true, to do so for a time, but upon grounds disconnected from—forming no part of—the arrangement between Moore and themselves at the time he entered the land in their names.

Upon the strength of this arrangement, telling Monroe of it at the time of making the sale to him, N. D. Moore sold Monroe a one-sixth interest and executed to him a deed therefor, with full covenants of warranty and title, and received from Monroe ten dollars in cash and Monroe's two hundred and forty dollar note therefor.

Had McDonald and McKay subsequently conveyed to N. D. Moore, as they were ready and willing to do, that conveyance would have inured to the benefit of Monroe (and his heirs, the complainants) without further proceedings, according to some cases, or by the aid of a proceeding in equity, according to others.

Irvine v. *Irvine*, 9 Wall 617.

Van Rensellaer v. *Karney*, 11 How. 323 and 326.
House v. *McCormick*, 57 N. Y. 321.
Bush v. *Pearson*, 18 How 82.
Smith v. *Williams*, 44 Mich. 242.
DeWolf v. *Hayden*, 24 Ill. 525.
Teft v. *Munson*, 57 N. Y. 97.
Smith v. *Baker*, 1 Young & Coll. 323.
Chew v. *Bonnet*, 11 Sarg. & Rawle, 389.
Way v. *Arnold*, 18 Ga. 181.
Goodson v. *Beacham*, 24 Ga. 150.

In several of these cases the court considers such a deed to be a contract for a conveyance where the grantor had no title at the time of making the deed.

Thus, in *Way* v. *Arnold*, one Pyncheon, having no title, sold to Way with warranty; Pyncheon subsequently acquired title and then sold to Arnold; at page 193 the court says:

> "If Pyncheon upon consideration, conveyed this subsequently acquired interest, and such was his intention, equity will decree a title to the after acquired estate, and the second grantee, Arnold, providing he purchased with notice, will be affected by such notice, and could not conscientiously hold the land in dispute."

In *Goodson* v. *Beacham*, one Nimms, by warranty deed, conveyed to Beacham, Nimms having no title at the time; Nimms subsequently acquired title; Goodson obtained title under execution sale; at page 153 the court says:

> "Nimms' deed to Beacham was an attempt to convey the fee; this shows that it was the intention that the land, the whole interest in

the land should be conveyed to Beacham; such being the intention, the consequence would be that if Nimms should afterwards acquire the title, he would be bound to convey to Beacham."

In *Smith* v. *Baker*, Baker assigned certain lands to K. T. & B. as trustees for themselves and others, creditors of Baker, for the payment of his debts to them. He supposed he owned the fee simple at the time of the conveyance; in fact the fee was in his mother. His deed of assignment contained a covenant that he, Baker, at that time "was seized of an estate in fee simple" in the land, "and had in himself good and full power to release and convey the same," subject to a mortgage hereinafter mentioned. Baker and his mother had previously given a mortgage on the same lands, and the assignee of this mortgage filed a bill to foreclose the same, making Baker and the above trustees parties; Mrs. Baker died previously to the foreclosure suit and her title descended upon Baker. Baker in his answer alleged that he supposed at the time of executing said assignment he was seized in fee, but that in fact his mother was then so seized, and submitted "whether the other defendants took any interest in the equity of redemption of the premises," and that, under the circumstances, the assignment "did not operate against him by estoppel." The vice chancellor decreed:

"That by virtue of the indentures of the 21st and 22d of June, 1832 (the assignment mentioned), the defendants K. T. & B., have

the equitable interest in the estate in question, subject to the first mortgage."

Thus confirming the master's report to the same effect. And at page 229, said:

"It may be that he did not know what his interest was at the time, but he cannot be allowed to deprive his creditors of the estate which he disposed to them for valuable consideration; it is not sufficient for him to say that he had no interest in it; for he subsequently acquired the estate which he said he had and which he may or may not have supposed himself to have had."

In *Chew* v. *Bennett*, under a similar state of facts:

"The facts presented constitute the ordinary case of a conveyance before the grantor had acquired the title, in which the conveyance operates as an agreement to convey, which, when the title has been subsequently acquired, may be enforced in chancery."

In treating of rebutter and estoppel by deed, in Smith's Leading Cases, Vol. 2, 739, Duchess of Kingston's case, Sixth American Edition, speaking of the Georgia cases, the editor says:

"There can be no doubt that the conveyances in question in these cases were valid in equity, nor, perhaps, that the grantors were estopped from disputing them at law; but it seems very doubtful whether they should have been regarded as transferring the legal title, or as doing anything more than precluding the grantor on the one hand, and entitling the grantee to go into equity for a conveyance on the other."

In *Smith* v. *Williams*, at page 242, the court says:

> "It is not disputed that a deed with covenants of seizen and title would be effectual to give the grantee the benefit of an after-acquired title, under the doctrine of estoppel, but these covenants were absent from the deed in question and the covenant of quiet enjoyment, it is said, would not have a like effect. No reason is given for any such distincton, and it is not recognized by the authorities. When one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenants for redress; the short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance; this is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given."

In *Van Rensellaer* v. *Kearney*, at p. 323, the court says:—

"If the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with an estate of a particular description and quality, or that the bargain had proceeded upon that footing between the parties, then although it may not contain any covenants of

title in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance."

Now, after the execution of his deed to Monroe, N. D. Moore had nothing further to do to effectuate Monroe's title to the land. The title would have passed by the execution of a deed to him, Moore, from McDonald and McKay. Moore had told Monroe that this deed would be given, had, perhaps, already been given. And had told Mrs. Monroe that he had the deed (Record 67). He had therefore nothing to do in order that the legal title (or the right to it in equity) might pass to Monroe; he had only to suffer McDonald and McKay to do what they had agreed to do and were at all times willing to do (except during an interval above mentioned), namely, to convey to him.

Instead of letting be, N. D. Moore induced the trustees to convey the legal title upon his wife for the sole and avowed purpose of avoiding the deed he had given Monroe, his wife being fully advised of that purpose and paying nothing. In other words, N. D. Moore, in order to cheat Monroe's heirs, procured the trustees to convey to his wife instead of to himself.

We say, that since McDonald and McKay made this conveyance to Helen Moore solely upon the consideration upon which McDonald and McKay's

agreement to convey to her husband rested, this being done on N. D. Moore's part in order to defraud Monroe by defeating the operation of the principal of law above noted, contrary to Moore's written obligation to Monroe, the transaction would in equity be considered the same as if the trustees had conveyed, as they were willing to do, first to the husband, and he had then conveyed to his wife; or as if they had conveyed to Moore and that deed had been suppressed by him and another deed made to his wife at his instigation.

Equity turns aside from the seeming and looks at the substance of things in order that right and justice may prevail; it is not to be cheated by tricks or appearances. No active steps were necessary on N. D. Moore's part to effectuate Monroe's title; he had only to suffer things to take their agreed course, and his obligations would have been fulfilled. Equity will not suffer him to interpose to fraudulently and craftily defeat a title he was bound to assure.

As is said in *Huxley* v. *Rice*, 40 Mich. at page 82, where the court enforced a constructive trust:

> "It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent or under circumstances it considers as fraudulent or oppressive by intent or immediate consequence, the party deriving title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief. And the setting up the statute of frauds by a party guilty of the fraud or mistake, in order

to bar the court from effective interference with his wrong doing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects."

Again, the principle is stated in Perry on Trusts, section 181, thus:

"Courts of equity will not only interfere in case of fraud to set aside acts done, but they will also, if acts by fraud have been prevented from being done, interfere and treat the case exactly as if the acts had been done; and this they will do by converting the party who has committed fraud and profited by it into a trustee for the party in whose favor the act would otherwise have been done."

So, in *Parkist* v. *Alexander*, 1 Johnson's Chancery, page 397, the court said:

"The plaintiff is entitled to relief. The intestate was intrusted by him with the agency of procuring a lease in fee of the premises in the name of Alexander McKnight, and he promised to perform the trust. Instead of doing this he afterwards purchased the title of McKnight and with the consent of McKnight but without the knowledge and consent of the plaintiff, took the lease in his own name. In consequence of this a mortgage from McKnight to the plaintiff and which was duly registered prior to the taking of the lease and prior to the deed of McKnight, is now attempted to be superseded by setting up this subsequent legal title in the intestate. This, I think, cannot and ought not

> to be permitted. An agent or trustee undertaking a special business for another cannot, on the subject of that trust, act for his own benefit to the injury of his principal."

And at page 398:

> "In this case and for the purposes of this decision I consider what ought to be done as done, and consequently that McKnight had the legal estate to support his mortgage to the plaintiff."

This equitable fiction forces upon a defendant the character of a trustee, even where, as between him and the party seeking relief no contract relations whatever exist. Thus in *Huxley* v. *Rice*, *supra*, there was no privity of contract between Huxley and Rice, and no contract at all enforcible as such.

III.

THE STATUTE OF FRAUDS OF MICHIGAN AS AFFECTING THESE TRANSACTIONS:

No one will venture to contend that this transaction was other than a gross and wicked fraud.

But it is strenuously contended:

1 That in spite of these facts the hands of the court are tied, and no relief can be administered because the Statutes of Fraud of Michigan forbid.

2 Because the bill of complaint is not so framed as to authorize relief.

These positions will be discussed in their order.

Several sections of the statutes of Michigan are cited relating to the forms necessary to convey or to create trusts in real estate. It is sufficient to say that these statutes except estates and trusts in real estate by act, operation or implication of law.

The following Michigan cases are both examples of the implication of trusts by its Supreme Court:

Huxley v. *Rice*, 40 Mich. 73.
Byrne v. *Rood*, 54 Mich. 67.

These statutes are invoked to show that, assuming there was no contract in writing signed by McDonald and McKay to convey the land interest to N. D. Moore, and no written declaration similarly signed by them showing that they held the same in trust for him, then complainants have no standing in this case for that reason; and the argument is that since in that case N. D. Moore could not, because of these statutes, have compelled a conveyance of the interest to him by McDonald and McKay, these complainants, who have N. D. Moore's rights, such as they were, and no more, could not have compelled a conveyance from McDonald and McKay, and therefore cannot compel one from Helen Moore, the grantee of McDonald and McKay.

It is said that Helen Moore stands, in relation to complainant's claim, where McDonald and McKay stood, and not otherwise. That if we could not have compelled them to convey to N. D.

Moore the third interest they had verbally promised him, no more can we call upon Helen Moore to convey to us the one-sixth interest N. D. Moore assured to Monroe by his deed to the latter.

Our reply is this:

So far as McDonald and McKay are concerned, granting that they might, as against D. N. Moore, have stood upon their rights under the statute and refused to convey the interest they had verbally promised him on request, they did not choose to do so. They waived the statute, as they had a perfect right—and were in honesty bound—to do, and conveyed on N. D. Moore's request. No one can invoke the statute for them; it was their concern, and theirs alone.

Barber v. *Milner et al* 43, Mich. 248.

Defendants have said on the above case that the conveyance was made to Milner in conformity with the terms of the verbal trust on which Gibson received his deed from Mrs. Barber, which was that Gibson should convey "to her or to any person to whom she should direct;" while in the case at bar the verbal trust or promise on the part of McDonald and McKay was that they would convey to N. D. Moore, while in fact they conveyed to Helen Moore.

More of this distinction presently.

But in *Patten* v. *Chamberlain*, 44 Mich. 5, Mrs. Chamberlain caused to be conveyed to her husband a certain "lot of land in St. Josephs county" on an oral trust that he would hold the same land for their daughter; the husband exchanged it for lands in Detroit, and caused that land to be conveyed and held for the daughter's benefit. The

land covered by the verbal trust was not the same land whereby the trust was satisfied. Yet the court would not allow it to be disturbed because of the statute, and said:

> "So for as concerns the controversy with these complainants, it is immaterial that the trust was a verbal one. It could not have been enforced against him, but it was nevertheless his duty to recognize and execute it; and when he did recognize it in the exchange made for other property, his creditors could not complain."

Can it be said in the case at bar that McDonald and McKay *did not execute the trust* to convey to N. D. Moore when they conveyed at his request without further consideration to his own nominee, but that in the above cited case Chamberlain *did execute his trust* by causing *other* land to be held for his daughter?

In *Newman* v. *Nellis*, 97 N. Y. 285, the defendants sold plaintiff's grantor a house lot, and represented orally at the time of the conveyance that a strip of land next adjoining it should be opened as a road "for the use and convenience" of the grantee, "his assigns and the public." The defendant did so open it, and it was so enjoyed by the grantee, and his grantee, the plaintiff; and the latter afterwards brought suit to restrain the original grantor from closing it. The court held that this verbal promise would have been void by the statute of frauds, and said:

> "But we know of no rule of law which prevents a party from performing a promise

> which could not be legally enforced, or which will permit a party morally but not legally bound to do a certain act or thing, upon the act or thing being done, to recall it, to the prejudice of the promisee on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action."

But on principal, what is the difference between an undertaking by A to convey to B a certain piece of land, and an undertaking to convey the same piece to him or to his order? There is no substantial difference except perhaps it be this, that A might, if he chose, insist on carrying out his promise as first above stated literally in spite of B's request to do otherwise, but having complied with the request, McDonald and McKay having acquiesced in the departure requested by N. D. Moore, can he be allowed to set it up, he or his nominee who stands in his shoes, and say it was not an execution of the trust?

The defendants insist that McDonald and McKay (in the absence of a written promise or declaration of trust) could not have been compelled to convey to Moore, even if they had orally promised so to do, or orally recognized an obligation so to do.

This was not and is not contested.

But when they further proceed to say that Helen Moore took the title from McDonald and McKay as a stranger would have taken it, as free to hold it and to disregard the moral obligation or

trust as McDonald or McKay would have been, had they seen fit to refuse to carry out N. D. Moore's request, the issue between them and us is as sharply defined as is desirable.

In support of this contention they cite several text books and cases.

Among them is:

Peckham v. *Balch*, 49 Mich.177.

In this case the court dismissed a bill in equity to compel the defendants to convey land upon the ground that the agreement to convey was verbal only and that no sufficient part performance was shown to satisfy the statute. The co-defendant, Winter. had purchased of the defendant, Mrs. Balch, the land in question; and the Court says:

> "The fraud of the defendant Winter, in purchasing from Mrs. Balch cannot make out an otherwise defective case for the complainant. If he could not have enforced specific performance as against Mrs. Balch, neither could he against her fraudulent grantee."

Of course not. But this is not our case.

If McDonald and McKay had disregarded wholly their arrangement with N. D. Moore, and, ignoring him and his wishes, conveyed the interest to A, who was fully cognizant of the breach of honor and therefore a "fraudulent grantee," the case would be the same, and A would have the same right to defy the obligations of honesty which they had.

But N. D. Moore is the connecting link between the complainants on the one side and McDonald and McKay and Helen Moore on the other.

The complainants hold N. D. Moore's obligation for a conveyance to them, a fact known to the other parties and with reference to which they, as well as N. D. Moore. acted. Moore had covenanted his rights to Monroe. Now, granting that if Moore could not have or had not procured McDonald and McKay to convey on the strength of their obligation to him, he, Moore, would have been liable to Monroe only in damages on his covenant, as defendants say, will the principles of equity permit him to actively and successfully interpose and exert himself—not to assure—but to defeat his own covenant for his own benefit.

Is this such a fraud as equity will let pass to shelter itself under the statute of frauds set up by the wrong doers themselves? That is one of the questions on this part of the case.

It is precisely because McDonald and McKay kept their faith with N. D. Moore by conveying on his order, that we say the statute was waived; and precisely because they conveyed not only by his order but also on the consideration solely which moved to them from him to one knowing all the facts and participating in the fraud, that we say that she cannot interpose the statute, which protected them alone.

The trust was carried out. Trickery so devised it that the legal title did not in fact pass to him and from him to her, but that was the substance of the transaction, and equity will so read it in order to save our rights, out of which we should otherwise be defrauded as was intended by N. D. Moore.

It was such an execution of the trust as frees the case from the operation of the statute of frauds

and enables a court of equity, by treating those things which ought to be done as done—by looking at things as they are in substance and not as tricksters would for their own purposes like them to appear—to afford relief.

McDonald and McKay having waived the statute, to allow Helen Moore to set it up, would be to permit her to accomplish a fraud by means of it.

Helen Moore is a shadow of her husband in this case; he procured the title which she holds; she had no part in it; he alone negotiated and acted; he is the sole author of her title, such as it is; *on what principle can she hold a title under these circumstances which he could not hold if lodged in him?*

It is objected that constructive trusts *ex maleficio* are never declared except where a conveyance had been obtained of the legal title by false representations and deceit by the grantee, or by mistake on the grantor's part without which the grantee would not have obtained it.

That Helen Moore did not so get her title and therefore cannot be compelled to convey it.

Many of the cases on this head are of this description.

Byrne v. *Rood*, supra.

It was also urged that the mere refusal to carry out a parol agreement to convey land is not such a fraud as will create a trust *ex maleficio*.

But we are not complaining of N. D. Moore for merely refusing to do as he agreed; he made a conveyance to Monroe of the land which he was shortly after to have himself, and to this extent he did exactly as he agreed; but after doing this, to defraud

us, he interposed and prevented McDonald and McKay from doing what they had agreed to do and were willing to do, and what, when done, would have made his deed to Monroe an effectual conveyance (in law or in equity). This is the fraud we complain of.

That the fraud is new in form and no court has ever declared the particular combination of circumstances as a fraud, will not deter a court of equity from making a precedent.

As it is said in Hill on Trustees, star page 145:

> "Therefore, if a case of fraud or presumption of fraud should arise to which no case previously decided, or *even no principle already established*, can be applied, a *new principle* will be established to meet the fraud, as the principles on which former cases have been decided have been from time to time established, as fraud contrived new devices."

But if it be true that no oral trust ex-maleficio will be enforced, notwithstanding the provisions of the statute of frauds, except conveyance be got directly by deceit of, or mistake on the part of the grantor, we submit that the facts here, fairly considered, will show that precise state of things. Let us see.

McDonald and McKay, before conveying to Helen Moore, were aware that her husband had conveyed to Monroe with a view of subsequently acquiring the title which they had promised Moore, through a conveyance by them to him.

McDonald and McKay were presumably honest

men, and would not have consented to defeat the rights of Monroe's heirs if they had supposed those rights to be still in force. This, we think, would be presumed in the absence of evidence. But there is evidence in the record to show it.

It is clearly because they did not at the time of the conveyance to Helen Moore believe Monroe's rights to be still subsisting that they consented to make this deed. Now, if the rights of Monroe's heirs were still in force (as we have insisted in another part of this argument) the deed to Helen Moore was made upon a mistake or a misapprehension of the facts, at the least. And whether this arose from the assumed knowledge of McDonald and McKay themselves of the dealings between Moore and Monroe, subsequent to the deed from the former to the latter, in relation to that deed, or partly from this source and partly from Moore's misrepresentations of those facts made to them, the legal title got from them by Moore in his wife's name was wrongfully or fraudulently got; and the trust accompanies it, or fastens upon its holder, in spite of the statute of frauds.

That Moore represented to them that his bargain with Monroe had been voluntarily abandoned by the latter, there is no doubt. And that they were influenced by it and were influenced to convey to Moore's wife because of it, is also sufficiently clear.

John McKay, one of the trustees, testifies that Monroe wrote him in 1875, or early in 1876, inquiring whether Moore had an interest in the land,

saying that he had been talking with Moore, and would like to buy an interest in it. To this McKay answered that Moore had no claim in the property which was owned by himself and McDonald, and that Moore hadn't any deed of it. Shortly after which time McKay was informed that Monroe had bought an interest in the land from Moore (Record, 23).

McDonald also knew of this interest shortly after it was conveyed (Record, pp. 30, 33).

These trustees were willing to convey to Moore and expected to do so up to the time of their conveyance to Helen Moore (Record 31).

At pages 44 and 45 of the record, N. W. Moore, in stating why the deed was made to his wife and not to himself, gives conversations or the result of conversations between himself and McDonald and McKay,and gives as a reason for the departure that he found Monroe's deed to have been recorded; that Monroe was dead and he expected that Mrs. Monroe would make trouble; and he says, at page 48 that he understood the settlement he made with Monroe put an end to the latter's claim to the land, and at page 49, that he was first told by McKay that Monroe had got his note back; and at page 53, that McDonald knew all the circumstances of the transaction or what were supposed to be the circumstances, namely, that the deed was put on record and the note returned; and it was the opinion of McDonald and McKay that under these circumstances, assuming them to be true, namely, in substance, that the bargain between Moore and Monroe had been rescinded, and yet

trouble might be made, that the deed should be made to Helen Moore.

From these citations, and from Record page 25, where it appears that McKay thought Monroe had forfeited his rights because of the return of the note, it sufficiently appears, we submit, that the trustees acted under the supposition, however got, that Moore had ceased to be under obligations to Monroe in the matter; and, we take it, it makes no difference whether the title was obtained from them through misapprehension on their part of the transactions, or through misrepresentations of the same on the part of N. D. Moore made to them.

We insist also, that the evidence shows that Helen Moore took the title in secret trust for her husband and for his benefit, and so held it. That her name is a mere cover for his title. And we submit that it tends to show a secret re-conveyance from her to him.

From N. D. Moore's cross-examination (pages 103-110), although he denies that there was any understanding between him and his wife that she should hold it in trust for him and denies a re-conveyance, it nevertheless appears that this property and the large sums of money realized from the lease of it and from sales of part of it, were dealt with as freely by him after the conveyance to his wife as if that conveyance had been to himself; that the avails of it have been largely, if not wholly, invested by him in property in his own name and on his own account; that although he kept books of account, he kept no account thereon with his wife; and that

she has had no credit whatever for the large sums received from this property which he claims to be hers. He therefore received as full benefit from it as he would have received with the title formally in his name.

Besides, he testifies that the purpose and object of the conveyance to her from McDonald and McKay was to head off the Monroe deed, and nowhere claims that the purpose was to give her the real ownership of the property.

Helen Moore was not called as a witness in the case, and did not testify therein.

His avowed object being thus accomplished, it is highly probable that he afterwards obtained from her the legal title or a conveyance for it, at least, in secret, for his mode of dealing with the property with her permission, is, if not inconsistent with an independent title in her, at least unnatural on that supposition. His bare statement that no such trust or such deed existed, is, under the circumstances and in view of the record he has made in this case, and in view of her absence as a witness, it seems to us, of no weight.

If against such proofs of a secret trust or title, the bare denial of the party alleged to be the beneficiary is to control, it is safe to say that no such trust or title can ever be established, for they are always or almost always erected for fraudulent purposes, and therefore in favor of those who will not hesitate to deny them.

IV.

IT IS SUBMITTED WITH CONFIDENCE ON THIS RECORD, THAT AN AGREEMENT IN WRITING TO CONVEY ONE-THIRD OF THE LAND TO MOORE WAS EXECUTED BY MC DONALD AND MC KAY AND DELIVERED TO MOORE OR FOR HIM.

If so the statute of frauds is immaterial.

One witness, William D. McIntyre, testifies positively that there was. He was present at the time the agreement was made; he furnished a part, at least, of the money for the purchase of the land, and was to have an interest in it, which he afterwards obtained; he fixes the time as in the winter of 1875; the place, in a room in a hotel at Hancock; he says that himself, Moore, McDonald and McKay were present; that Moore wrote it; that McDonald and McKay signed it; that Moore kept it; that Moore went to Lansing the next morning to locate the land and shortly afterwards returned. (Record 56–61). It was wholly immaterial whether Moore signed it or not; all that was necessary to secure Moore's rights was that McDonald and McKay should sign a statement or agreement that he was entitled to a third interest in the land.

Such an agreement or declaration in writing signed by McDonald and McKay would satisfy the Michigan Statute of Frauds. It would contain, as described by the witness, a description of the land, and McDonald and McKay's obligation to convey it to Moore, or that it was his. The consideration,

under Michigan law, need not have been expressed in it.

Howell's Annotated Statutes, paragraph 6182.

It seems hardly needful to observe that if such an agreement was made, the fact that the deed was subsequently taken in the name of McDonald and McKay would not affect it, although counsel, in one of their briefs, so argue. It would of course subsist and attach to the title got by McDonald and McKay.

The fact that McIntyre does not remember all the minor details with certainty, such as who took and kept the paper, does not militate against his evidence. It is of no consequence, if what was done amounted to a delivery; and if his testimony is true, what was done did amount to a delivery; McIntyre saw the paper, heard it read, and testifies positively and unequivocally that it provided for a third interest in the land to Moore. The particular language of the paper is immaterial. Had he pretended to give the exact language, his testimony would, after such a lapse of time, be justly open to suspicion. The interest which Moore, by the paper, was to have, according to McIntyre, tallies exactly with the testimony of all the other witnesses as to the verbal declarations of what the agreement was, and with the undelivered deed to Moore made out the same year and deposited with Viele.

No one disputes the interview; no one disputes that the money for the purchase was then and there furnished to Moore; no one disputes that the four

were there at that time on that business in the Lake View house, and then and there consummated the arrangement for the purchase of this land.

These facts stand forth undenied and incontrovertible. The defendants do not put either McDonald or McKay or Moore upon the stand to deuy it. McDonald was not recalled. McKay and Moore were both recalled to the witness stand after McIntyre thus testified, but neither is asked about this interview and its particulars. The fair inference is that neither of them could deny it.

The only apparent contradiction is that of Moore himself, an intensely interested witness; he does not say that no such agreement was drawn up, but that he "had no contract in writing" (Record, 36, 109).

In one of the defendants' briefs it is contended that the evidence of this written contract is inadmissable because a notice to produce was served upon defendants' solicitors too late.

It was served on the same day that Moore was last examined, and as Moore denies that he had a written agreement, it would seem as if any further or other notice were needless, if, indeed, any were needed.

It is entirely consistent with Moore's testimony to believe that a written contract was made out and left with some party for him.

McDonald and McKay do not deny the giving of the written agreement. McKay says, "I don't remember us giving him any writing for it" (Record, 25). McDonald says, "I don't recollect having any written agreement" (Record, 31).

But the learned counsel for the defendants brush this testimony aside, and say:

> "That McIntyre is an utterly unreliable and unfaithworthy witness."

Why? (1) Because he is a brother of Mrs. Monroe, now Mrs. Crawford. But is not Mrs. McKay a sister of Mrs. Crawford? (2) Because he could not at first tell who kept the paper, although afterwards testifying that Moore kept it. It is of no consequence who kept the paper, if the transaction amounted to a delivery of it, and we submit that it clearly did.

We invite the careful attention of the court to the testimony of McIntyre, which covers only four pages above cited.

In this connection Judge Dillon in his brief, at page 22, says:

> "Later he (McIntyre) testifies (Record, p. 86) that he did not see the agreement."

There is no such testimony on page 86, nor elsewhere in the Record.

Either McIntyre's statement about this transaction is true, or he is a perjurer. Is it possible to conceive that he would manufacture this story out of whole cloth? There must be some motive for perjury. If anybody contradicted or called in question the particulars of this interview, such an epithet might have some defense. The words "unreliable and unfaithworthy witness," we suppose, mean that his testimony doesn't suit the defendants. *It is almost inconceivable that McIntyre would invent a story so reasonable, so consistent with common business principles, so natural, fixing*

the time and the place, giving the words of the actors, telling who wrote the paper, what one said when he signed it, with whom he went there and with whom he came away; each one of these particulars furnishing ample chance of contradiction, and none was attempted.

If W. D. McIntyre does not appear on this record to be reliable and faithworthy, who is so?

V.

THE DEED EXECUTED BY MCDONALD AND MCKAY TO MOORE, AND DEPOSITED WITH VIELE, A COMPLIANCE WITH THE STATUTE OF FRAUDS.

The history of this deed has elsewhere been shown.

It is frankly admitted that the authorities do not agree as to whether a deed under such circumstances is a compliance with the statute. This deed evidences the whole contract between the parties. Moore had fully performed. There is no doubt as to what their parol agreement was prior to the execution of the deed. Certainly, by such a deed the purposes of the statute of frauds have been accomplished; for there is no danger that the title to lands is left to the fleeting memory of witnesses, or to be wrested from its owner by perjury.

Delivery of an instrument is not necessary, in all cases, at least, to comply with the statute.

In *Uram* v. *Coates*, 109 Mass. 581, there was no

delivery of the declaration of trust. It was found among Rand's papers after his death. It was held valid. At page 584 the court says:

> "We are of the opinion that this writing is "sufficient as a declaration of trust within the "meaning of our statutes. It is much more "formal and particular in its statement than "declarations of trust, description by letter, by "answer in chancery, by affidavit, recital in "bond or deed, or pamphlet, which have all "been held sufficient, *and with reference to "which it is held to be no objection that they "were drawn for another purpose, and not "addressed to nor intended for the use of the "cestui que trust.*"

In a Pennsylvania case the court say:

> "Not having been delivered, it (the deed) conferred no title, and having been retained exclusively in the vendor's hands, it could not serve the purpose of averting the object of the statute; but its execution was a fact bearing upon the question of the existence of the contract; it was a deliberate admission that the land had been sold and an explicit declaration of the terms of the sale, and of the quantity and boundaries of the land and of the amount of the purchase money. Its production in evidence could have been enforced for the purpose to which it would extend; not to establish title and not to avoid the statute, but to show a carefully considered acknowledgement and recognition by Carroll of Hart's contract rights. *Can it be doubted that verbal testimony of declarations by*

the plaintiff of the precise facts related by the deed would have been admissible in aid of the grounds on which the defense rested? And how, in view of such clear and definite evidences as would be thus afforded, would a chancellor find embarrassment in decreeing specific performance."

Carroll v. *Hart*, 85 Pa. State, 570.

The following cases hold expressly that a deed executed though not delivered, is a sufficient memorandum in writing of a contract to satisfy the statute of frauds.

Parrill v. *McKinley*, 9th Gratt. 1.
Bowles v. *Woodson*. 6th Gratt. 78.
Jenkins v. *Harrison*, 66 Ala. 352.

In this Alabama case, page 356, the court says:

"It is certainly true, as is insisted by the appellant's counsel, that delivery is essential to give effect to a deed,as essential as signing or the attestation of witnesses or a legal acknowledgment of execution; and it is true, that though signed, attested and acknowledged, so long as the grantor retains control or dominion over it; so long as he desires not to part with it with the purpose that it shall enure to the grantee, title will not pass from him. The concession does not meet the point upon which judgment is to be pronounced. We are not inquiring whether the grantor has parted with the title to them and the grantee has become invested with the title. The gravamen of the complaint; the necessity for a resort to a court of equity consists in the fact that the grantor has not, as he was bound to do by the contract existing be-

tween him and the grantee, parted with the legal title; and it is the performance of that contract which is claimed and which is the primary object of of the suit. It is written evidence of the contract by the vendor to the performance of which we are inquiring; and that, according to the authorities may be obtained from any document or instrument signed by the vendor; *and it is not necessary that it should have been written with the view of furnishing evidence of the contract and looking after its final consummation.*

Whenever a note or memorandum of the substance of a contract signed by the party to be charged is produced, whatever may be its form or character, or whatever may be its operation or validity in courts of law, the words and purposes of the statute are satisfied. The party is shielded from the peril and mischief springing from the frailty and uncertainty of mere oral evidence resting in the fleeting memory of witnesses ,and the court has, over his own signature, clear and satisfactory evidence of the contract to be enforced.

Without passing beyond the facts of this case, we hold that a deed drawn and executed with the knowledge of both parties with the view of the consummation of a contract of sale which in itself and of itself embodies the substance, though not all the details and particulars of the contract, naming the parties, expressing the consideration, describing the lands, though not delivered, and its delivery postponed until the happening of a future event, is a note or memorandum of a contract

sufficient to satisfy the words, the spirit and purpose of the statute of frauds."

Reed, in his work on the statute of frauds, says:

"The weight of authority is in favor of treating an undelivered deed as no compliance with the statute of frauds, *in the absence of special circumstances showing that it was so intended by the parties.*

The parties here meant are the owners of lands.

That McDonald and McKay executed this deed in pursuance of an undisputed oral agreement, is clear; that it embraced the whole of the contract is clear; and that it contained all the essentials of such a deed, is clear.

Even laymen fully understand what is meant by a deed; and when they speak of a deed of lands they thoroughly understand what is meant.

It can hardly be said that there is no evidence that Moore did not know of this deed. He told Monroe the deed was then probably made out, according to his own testimony, and according to Mrs. Monroe's statement that the deed was then made out.

In the case of *Campbell* v. *Thomas*, 42 Wis. 441, it is said that "If it (the deed) contained the whole contract, we should have no difficulty in holding that it answered the requirements of the statute."

See also, *Thayer* v. *Luce*, 22 Ohio St. 74.

VI.

IT IS OBJECTED THAT IF THE DEED FROM MOORE TO MONROE BE CONSIDERED AS A CONTRACT TO CONVEY, THEN, AS MOORE WAS UNABLE TO PERFORM HIS PART OF IT IN MONROE'S LIFETIME, THE LATTER COULD NOT HAVE BEEN COMPELLED TO PERFORM ON HIS PART, AND THEREFORE NO RIGHT DESCENDED TO MONROE'S HEIRS TO ENFORCE THE CONTRACT.

Judge Dillon's argument, 92-98.

In reply to this, we say that it does not appear that Moore could not have enforced that contract in Monroe's life.

It does appear it is true, that he did not obtain the legal title in Monroe's lifetime, but it does not appear that he could not have done so; *but on the contrary it does appear that he could have obtained the title had he chosen so to do.*

Fry on Specific Perform. 2nd Ames Ed. §702.

Monroe died in August, 1878. McDonald's objections to conveying to Moore were removed in 1877. That is, Moore and he had in that year a settlement of certain affairs which McDonald had, until then, chosen to consider a reason for not conveying (Record p. 77). And he was then and ever after ready to convey to Moore (Record p. 31). McKay never had any objections to conveying, and actually signed a deed of conveyance in 1875. McKay's wife made objections to signing, and it does not definitely appear when these were removed (Record 21). But Mrs. Mckay's signature to a deed conveying an interest held in trust was unnecessary.

We submit, without pursuing the matter at fur-

ther length, that all the reasoning of his brief, based on Judge Dillon's erroneous assumption above noted, falls to the ground.

We frankly say to the court that we have not found any case like this upon the facts; but we submit that *Tuite* v. *Miller*, 10 Ohio, cited by Judge Dillon at page 74 of his argument, is not a case necessarily adverse to our position. In that case the aid of the court was invoked against an annual charge of dower of $60 imposed upon the land in question by a former decree. It was held that the other covenants in the deed given by the husband of the doweress which formed the basis of plaintiff's claim to relief, were not broken by the fact that at the time of the conveyance an inchoate right of dower existed which might have become vested. And as to the covenant of warranty, the court says:

> "The rule is universal that no right of action arises under this covenant except after an eviction or something which is equivalent."

Thus holding that this covenant was not broken. If the covenants were not broken they could not be specifically, or otherwise, enforced.

We submit that for the same reasons on which a court of law acts in estopping one who has granted land which he did not own at the time of the grant, when he subsequently acquires the legal title, from asserting it or calling in question his own grant, a court of equity may compel a conveyance of the legal title lodged in another who has no just claim to the title because it was obtained for him without cost, and with notice, and by the person bound by his own grant

—if not to make the same good—at least not to wrest away or divert it.

We know not where to find a more forcible statement of these reasons than in the opinion of this court in *Van Ransellaer* v. *Kearney*, 11 Howard 297, at page 325. The court says:

> "The principle deducible from these authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, *if the grantor sets forth on the face of the instrument by way of recital or averment, that he is seized or poseessed of a particular estate in the premises, which estate the deed purports to convey, or if the seizen or possession of a particular estate is affirmed in the deed either in express terms or by necessary implication*, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after acquired title as between parties and privies. *The reason is* that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealdealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone; and although it debars the truth in the particular

case, and therefore is not infrequently characterized as odious and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood, would be the denial of a previous affirmation upon the faith of which persons had dealt and pledged their credit or expended their money. It is a doctrine therefore, when properly understood and applied, *that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak.*"

VII.

THE SUFFICIENCY OF THE BILL OF COMPLAINT TO AUTHORIZE A RECOVERY IS CALLED IN QUESTION.

It is argued that the bill is not properly framed to recover on the theory of the case as above discussed.

The bill alleges that McDonald and McKay became in January, 1875, the holders of the legal title to the quarter section, an undivided one-sixth whereof was in October, 1875, conveyed by N. Moore to Monroe; that McDonald and McKay held in trust for N. D. Moore an undivided one-third of the same, and that in order to carry out the trust, sometime between January, 1875, and

March, 1881, executed a deed of said third to N. D. Moore; and that this deed was, after its execution and delivery, suppressed and destroyed. The proofs fail to show that such a deed was signed by the wife of McKay, and do show that it was never delivered; had it been signed by the parties and delivered and then suppressed by the grantee, that would have made a complete case. In so far as that aspect of the case is concerned, we admit that it is not made out.

But the bill and amendments allege the deed from N. D. Moore to Monroe of one-sixth of the land; that McDonald and McKay became the owners in fee of the entire quarter section, "holding an undivided one-third thereof in trust for the said Nat. D. Moore, by an arrangement between the said McDonald and McKay on the one side and the said Moore on the other, entered into before or at the time the said McDonald and McKay acquired title." That in 1880 they, at N. D. Moore's request, deeded the said one-third to Helen Moore, who paid nothing therefor, and that the same vested in her as trustee for N. D. Moore and for Monroe and his heirs; that the latter deed was made for the purpose of cutting out complainants' title derived from the deed from N. D. Moore to Monroe. That the conveyance from McDonald and McKay to Helen Moore was made at N. D. Moore's instigation with the intent and purpose to defraud complainants by lodging the apparent legal title in his wife's name, though for his benefit; that this transaction ought to be considered as if the conveyance had been made to Moore himself, and that

the husband and wife were estopped; that she had no interest in the one-sixth as against complainants; that the title to the same is in complainants "by virtue of the premises," and that Helen Moore took her deed with full knowledge of complainants' rights.

It is argued that the bill alleges no sufficient case except the particular case abandoned by us because of failure of proof; that the allegations of a trust in Moore's favor upon the title in McDonald's and McKay's hands is not sufficiently full, under authorities like Perry on Trusts, section 137.

We answer: *First*—That complainants were necessarily in the dark as to the precise facts touching the relations between McKay and McDonald on the one side and N. D. Moore on the other, with respect to the latter's interest; they could only know from the declarations of Moore when he conveyed to Monroe, that he was entitled as against them, to a one-third of this land; so far as they knew McDonald and McKay were, in respect to this one-third, holders of the naked legal title, in the language of the bill, ("but holding an undivided one-third thereof in trust for the said Nat. D. Moore *by an arrangenent between the said McDonald and McKay on the one side and Moore on the other, entered into before or at the time the said McDonald and McKay acquired title.*"

The words, "by an arrangement between them," etc., fairly mean an agreement that they should hold the legal title, and do not refer to any conditions or terms qualifying the trust. Without these

words in italics, or with them, if we correctly interpret their bearing, the bill alleges a naked trust of the legal title without conditions of any kind; and this view is strengthened by the allegations further on—"that in order to carry out said trust," etc., they conveyed the interest to Moore "*at his request*," and still further on that—"*at the request of the said Moore*," they conveyed the same interest to his wife.

We submit that this allegation means that the trust was to hold the legal title only, and convey the same on request.

Second. The evidence taken shows this to be the very fact. The defendants therefore have been in no manner surprised or injured by this allegation of the bill, even though it be admitted that it somewhat lacks fullness and precision.

If the bill had run "in trust to convey the same to N. D. Moore on request," it would have been in this respect entirely precise and full. We submit it is sufficiently so.

It must not be forgotten that the case we have argued above, does not rest on the fact alone that McDonald and McKay held in trust for Moore, but also mainly upon the fact, which is amply alleged and proved, that they fully recognized the trust by a conveyance of the interest on the beneficiary's request to his nominee, made with the intent and for the purpose of fraudulently avoiding the beneficiary's contract with the complainant's intestate.

The existence of the trust between McDonald and McKay and N. D. Moore is of importance only as explaining the latter's deed to Monroe and the

purpose and expectation with which it was made by Moore and received by Monroe.

It being true that there was a trust, and that although oral (if it was oral) *it was executed*, and that in consequence of N. D. Moore's relations and doings with Monroe and with Helen Moore, Monroe's heirs became equitably entitled to the benefit of it, it became unessential to allege the conditions of the executed trust before its execution, if conditions there had been. This renders the principle that "The trust should be clearly alleged in the bill, not only in terms, but all the facts should be set out with great clearness and certainty" cited by defendants, inapplicable.

That principle applies only to cases where the object of the litigation is to compel the execution of the trust against the trustee under circumstances such that the complainants must make it appear by allegation that he has performed those things which by the very terms of the trust or contract were incumbent upon him in order to entitle him to the property.

In the case at bar, Monroe having from Moore, with whom alone was his contract, a deed with full covenants of warranty and title, is, if our argument is good, entitled to have that deed made good whenever the subject matter of deed is alleged and shown to have vested in Moore, either in contemplation of law or of equity.

This contract of Monroe with Moore is fully stated. So also are the facts from which it is claimed that the land in question subsequently, in the contemplation of equity, vested in Moore.

It is the fact that the trust existed—not its terms—which, after its execution, is important.

It is insisted by the defendants that the complainants do not offer to pay the balance of the purchase money.

This does not go to the merits of the controversy, and the court can decree payment.

> "The allegation of offer to perform is merely "formal. It may well be doubted whether, "in a case of this kind, it is material, the party "seeking specific performance, having on his "part performed partially, and being hin- "dered from performance by the act of his ad- "versary, who, it is evident would not, if it "were tendered, accept further performance." *Jenkins* v. *Harrison*, 66 Ala. 352, and cases there cited.

VIII.

One of the main grounds of defense is that there was an agreement between Moore and Monroe to the effect that Monroe should quit-claim the land to Moore or surrender to him the deed, which was carried out by Moore.

This defense is set forth in the answer in the following language:

That "Monroe paid on obtaining said deed only ten dollars, giving his note for two hundred and

Kent v. *Losley*, 24 Wis. 684.
McClellan v. *Sanford*, 26 Wis. 595.
Harter v. *Christoph*, 32 Wis. 248.
Kirchval v. *Doty*, 31 Wis. 491.
Pringle v. *Dunn*, 37 Wis. 449; 50 Wis. 200.
Howland v. *Blake*, 97 U. S. 626.

In *Munday* v. *Foster*, 31 Mich. 313, complainant sought to set aside a trust deed made by his wife in her lifetime on the ground that he had deeded her the same property with the agreement that she was to make a will leaving it to him; complainant and his sister were the witnesses to the parol agreement. His testimony was incompetent under the statute of Michigan above mentioned but the court considered it on this question. His sister testified positively that the decedent told her of the arrangement and that she had made the will, but the court held that it was insufficient to set aside the deed because her testimony was weak and uncertain, saying at page 323:

"If any case of this sort can be sustained by verbal proof, the contract should be proved in the clearest manner and the evidence ought to be above suspicion."

In *Kent* v. *Losley*, 24 Wis., the grantor sought to prove that the deed was, in fact, a mortgage; the grantee was dead; the proof consisted of the testimony of the grantor alone; held insufficient to convert a deed absolute on its face into a mortgage.

Judge Dixon, at page 658, says:

"*I very much question whether, in any case, after the decease of the grantee, the unaided testimony of the grantor alone, however intelligent and credible he may be as a witness, should be held sufficient to set*

aside the deed or invalidate the title claimed under it."

In *McClellan* v. *Sandford* (26 Wis.) the question was the reformation of a deed on the ground of a mistake; held that the proof must be clear and convincing. At page 607 the court approve the doctrine above quoted from the case of *Kent* v. *Losley*.

In *Harter* v. *Christoph* (32 Wis. at page 248) the court say:

"The defendant, Christoph, seeks to impeach a mortgage for an alleged mistake therein. Unless the evidence clearly and satisfactorily proves the alleged mistake, or, in the language of many of the courts, unless it proves the same beyond a reasonable doubt, the defence fails."

Again, on page 249:

"It would be an extreme case which would justify the court in reforming or defeating the written instrument upon the uncorroborated testimony of a party to it, although such testimony were uncontradicted."

In *Kirchval* v. *Doty* (31 Wis. 491) held that the greatest clearness and certainty of proof are required, and that the facts must be established beyond any reasonable controversy.

In *Pringle* v. *Dunn* (31 Wis. 449) the question was whether a mortgage was subscribed by a witness at the time of execution; on page 459 the court say:

> "The testimony is quite strong and positive that the mortgage had no subscribing witness when it was recorded."

Yet the court held it was not sufficient to overcome the strong presumption that fairly arises from the instrument.

All the above cases are approved in 50 Wis. 200.

The above cases are cited and approved in this court in *Howland* v. *Blake*, 97 U. S. 624.

In order to defeat a deed it is there held that the testimony must be entirely plain and convincing beyond reasonable controversy. The witness on whose testimony it was sought to set aside a foreclosure deed was the brother of the mortgagor and conducted the business in his absence; and the court say, page 627:

"He occupies very nearly the position of a party, and upon the unsupported testimony of a party, two of the cases above (referring to the Wisconsin cases) adjudge that such a decree cannot be sustained."

Now an examination of Moore's answer and his testimony shows that not only is it not above suspicion, but that it is inconsistent, contradictory and unreliable.

INCONSISTENCIES BETWEEN MOORE'S ANSWER AND HIS TESTIMONY.

1. In his answer he says that at the time of his deed to Monroe, Monroe gave him one hundred and fifty dollars besides to enter land "if he should know of any that was desirable" (Record, 4).

In his testimony he says that having found a forty acres south of Agogeebic Lake containing cobalt, nickel and traces of tin, and believing the property valuable, he told Monroe that if he

wished to enter the land and give him a half interest, he, Moore, would furnish the minutes. Monroe furnished the money to Moore for that purpose, but Moore did not enter the land, because, as he says, it had been previously entered (Record, 36, 37, 52).

Moore then received this money to purchase a specific piece. He did not get the piece, nor did he return the money, nor inform Monroe that he could not get the land; but used this trust money for his own purposes.

2. In his answer he says that it was agreed that Monroe should quit-claim to him (Record, 5). In his testimony he says that Monroe said, after being informed that the note for $240 was in the hands of Mr. or Mrs. McKay: "I know that, I can get the note from them and will send you back your deed" (Record, 38–39).

The difference between executing a deed and surrendering one already executed, but unrecorded, is apparent. Evidently Moore concluded between the time of his answer and the time of his testimony that the latter theory was more plausible. Hence the amendment of the answer (Record, 9-10).

3. In his answer he fixes the date of the rescission as about six months after the purchase (Record, 5). In his testimony he fixes it first in August or September, 1876 (Record 37); but finally, when recalled, fixes it in September, or more probably as early as October, 1876 (Record, 50).

4. In his answer he fixes the date at which Mrs. Monroe obtained the note from Mr. or Mrs.

McKay as early in the summer of 1876, which is correct. And alleges that it was part of the agreement of rescission that he, Moore, should "cause said Monroe's note * * * * to be surrendered to him." And after, alleges that "said McKay, *as he had been previously reqaested* by said Nathaniel D. Moore, thereupon delivered said note," &c., "and the same was cancelled" (Record, 5).

In his testimony he does not pretend that he either caused the note to be surrendered, or ever requested McKay to surrender it (Record, 43 and 49).

John and Jane McKay had both testified previously to the taking of Moore's deposition, that the note was not given up by them to Mrs. Monroe pursuant to any instructions from N. D. Moore (Record 20 and 23).

Hence he was obliged to abandon making his testimony conform to his answer.

A pertinent inquiry is how did he suppose that Mr. and Mrs. McKay would give up this note without his authority?

5. In his answer he says that he paid to Monroe *the* ten dollars paid upon the deed about a month after the talk with him about the rescission, and that he soon after paid up the remainder of the one hundred and sixty dollar note (Record, 5).

In his testimony he says he never paid back the ten dollars as an independent sum (Record 49), nor did he pay that nor any other sum within a month, nor until months afterwards (Record, 38).

Nor did he pay the balance "soon afterwards." He paid some prior to Monroe's death and did not

pay the balance or make any attempt to pay it until years after Monroe was in his grave, and he thought that the property was more valuable (record 38, 39).

6. In his answer he says that the note was delivered up and cancelled (Record, 5). In his testimony he says nothing about its being cancelled. It is evident that he knew nothing about it (Record 39). It was not cancelled, but was preserved by Mrs. Monroe, now Mrs. Crawford, and was produced in evidence by her, intact and uncancelled (Record, 76).

NOW TO THE ABOVE INCONSISTENCIES BETWEEN MOORE'S ANSWER AND HIS TESTIMONY, ADD THE FOLLOWING FACTS AS FURTHER BEARING UPON HIS CREDIBILITY.

1. At the time of the alleged contract of rescission, Moore and Monroe lived within three miles of each other until shortly before Monroe went to Colorado, which was in July, 1878, where Monroe died on the 16th of August following (Moore's testimony, Record 45, 46; Mrs. Crawford's testimony, Record 61).

2. Moore never asked Monroe to quit-claim or to surrender the deed. If it was a complete agreement, with no conditions precedent, why did he not get the deed? Monroe could in that case have no object in keeping it. Moore, being pressed for an explanation, and recognizing the necessity for some excuse for this, frames this flimsy one:

> "One reason was that I knew so little about the law that I thought that I had made

myself liable in giving that deed and didn't want to stir it up more than was necessary, and another thing, I didn't want to press it on account of the way I was paying the other note; I didn't want to go and urge him to deliver it while he was accommodating me; but the main thing was that I was ignorant of the law and really thought I had got myself into trouble in giving the deed" (record 51).

This excuse seems lame enough and is inconsistent with Moore's theory that his transaction with Monroe was either rescinded or abandoned.

IX.

IN ORDER TO SUSTAIN THIS HEAD OF DEFENCE THE DEFENDANT MUST SHOW THAT THE AGREEMENT OF RESCISSION BETWEEN MOORE AND MONROE WAS COMPLETED; AND THAT MONROE HAD ABANDONED HIS RIGHTS UNDER THE DEED.

We submit that if the proof of this proposition depends upon Moore's testimony wholly or mainly, the court could not safely find it from the testimony of such a witness.

What evidence is there then, if any, in corroboration of Moore's answer that a complete rescission of this transaction was had between him and Monroe.

On July 4th, 1876, Mrs. Crawford, then Mrs. Monroe, being at Hancock, at the house of her sis-

ter, Mrs. McKay, received from Mrs. McKay the $240 note (which, with ten dollars in cash was the consideration for the Moore-Monroe deed) and took it away with her. (As to the circumstances under which she got it, her declarations at the time, etc., more will be said hereafter.)

Mrs. Crawford, in her testimony on cross-examination, gives the following account of what she did with it, and there is no other evidence whatever upon the subject.

"Q. Did you take the note home with you when you went? A. Yes, sir.

Q. How long after you got the note before you went went home? A. I staid out there (at her father's at Calumet) about a week.

Q. What did you do with the note when you got home? A. I took care of it as she told me to.

Q. Where did you put it? A. I put it in the drawer where we kept our papers then.

Q. Did you show it to your husband? A. Yes, sir.

Q. Showed it to him when you first got home, did you? A. Yes, sir.

Q. Did you ever say anything to Mr. Moore about having the note? A. No, sir.

Q. Didn't tell him you had it or anything of that kind? A. Never said a word about it to him.

Q. Or Wm. McKay? A. I never seen William McKay; I seen him several times; I was slightly acquainted with him.

Q. She told you if he called for it you would have to give it to him? A. She told me if Wil-

liam McKay ever called for it I would have to produce it.

Q. Did he ever call for it? A. No, sir.

Q. Did your husband ever tell you what that note was given for? A. No, sir.

Q. Did he tell you to return it? A. No, sir,

Q. Give you any instructions at all about it? A. No, nothing more than he said to put it by.

Q. You say that he didn't even then tell you what it was for? A. No, nor I didn't ask him."

(Record, 69.)

This note was always kept by her and was produced and filed (Record 76).

It was never "cancelled" as the answer alleged. That it was never cancelled in fact, or destroyed, furnished in itself a strong presumption that no rescission of Monroe's bargain was ever completed or carried out.

The note was never delivered by Moore or by his order or directions, but contrary to them.

Moore testifies:

> "Q. After being told by Mr. Monroe that he knew the note, the $240 note, was in the hands of the McKays, did you give the McKays any instructions to give it up to him? A. No, sir, I think not; he told me he knew it was there and could get it and I didn't pay any more attention to it" (Record 49).

The time of this conversation fixed by Moore as above shown was in September or October, *two or three months after Mrs. Crawford received the note, took it home and showed it to her husband, Monroe.* Moore testifies that he was first told by Mc-

Kay about a year after the alleged rescinding agreement that Monroe had got the $240 note back (Record 49). Shortly after he testified that Mr. and Mrs. McKay told him of this fact *after the beginning of this suit* (Record 50). Moore says he never talked with Monroe about the giving back the note, and says the note was lodged with Mrs. McKay by William McKay under directions from him to McKay, namely, to raise money on it (Record 43). While Mrs. McKay says that Moore's messenger gave her the note "*to keep or to give back to Mrs. Crawford* then Mrs. Monroe) *or to collect*" (Record 20).

Mrs. Crawford says that Mrs. McKay told her the note had been left there by William McKay, gave it to her and told her "to take care of it in case it was asked for by William McKay, and I should have to produce it" (Record 52).

We submit that Mrs. Crawford's version of how she came to get the note and the conditions under which it was given her, are at least as probable as that of the McKays, husband and wife.

If Mrs. McKay let her have it unconditionally she certainly committed a strange and unnatural breach of duty towards Moore, and there is nothing in the record to show why she should then have been willing to give away Moore's property without authority from him.

Note here, also, that Mrs. McKay on cross-examination doesn't undertake to directly deny saying what Mrs. Crawford reports her as saying, and that at the time Mr. McKay advised his wife that the note belonged to Moore (Record 23).

Q. At the time you gave the note to Mrs.

Crawford, then Mrs. Monroe, what did you tell her to do with it? A. I don't know as I told her to do anything with it.

Q. Didn't you tell Mrs. Monroe to keep it, as it might be called for? A. Not to my knowledge (Record 21).

The only other evidence claimed as coming home to Monroe in regard to the alleged rescission, is from McDonald and Moore, for William D. McIntyre's testimony on this head is too confused as to time and too uncertain in meaning to be relied on (Record 83-88).

McDonald says that in *June or July, 1876*, Monroe asked him to collect some money for him from Moore on the latter's note which he, Monroe, then had with him. That Monroe asked him about the value of the land in question, and *if he could get his money out of Moore* he didn't want the land (Record 30). "His money" was the ten dollars he had paid for the land in question in addition to the note given by him to Moore, and the one hundred and fifty dollars he gave Moore to enter the other land. Thes etwo sums made up the one hundred and sixty dollar note as claimed by Moore.

This conversation between Monroe and McDonald took place nearly nine years before the latter testified. The deposition was taken January 20th, 1885 (Record 28).

And McDonald says on cross-examination:

"Q. Had you taken any particular pains to charge yourself with this conversation? A. No, sir, I was around after my own business,

and I went out there to get some blacksmith work done" (Record 34).

And McDonald's memory was so uncertain that he could not remember that he signed a deed of this one-third interest to Moore, although the fact that he did is beyond question (Record, 13, 31, 33).

We have above recited, or intended to recite, all the evidence that can be claimed to corroborate Moore's allegations in regard to the rescission.

Now let us take Moore's own version of that transaction.

He says that in August or September, 1876, Monroe came to him and wanted *the money "he had given me to enter that land;"* saying, he knew no deed of it had been given and none ever would be; that Moore told him that the note given for the purchase was in the hands of Mr. or Mrs. McKay, which Monroe said he knew—"He says, I know that I can get the note from them, and I will send you your deed back, I haven't had it recorded" (Record, 38).

On this same subject, on cross examination, Moore says, "he told me it was no good to him, that I hadn't got any deed, and consequently he considered the matter settled *when he should return the deed to me*" (Record 48-49).

Afterwards Moore fixed the time of this conversation as "*either in September or October, and I am inclined to think it was early in Ociober, 1876*" (Record, 50).

Now it is singular that such a conversation should have occurred either in August, September or October, 1876, as fixed by Moore.

Why should Monroe have then said "I can get the note from them" (the McKay's) when he had it or his wife had, and showed it to him in early July, 1876? Mrs. Crawford got it before July 4th, 1876 (Record, 73, 68, 62).

She was away from home on that occasion only a few days, and went to McKay's on her way to Calumet, before July 4th, 1876 (Record 98, 73).

Mrs. McKay says this visit was in the summer of 1876 (Record 20); John McKay that it was in July or August, or thereabouts (Record 23); James McIntyre says his daughter was at his house at Calumet, July 4th, 1876, and never on any other 4th of July (Record 95).

Again, McDonald fixes his interview with Monroe when the latter offered him Moore's note, in "*June or July*"—"During the summer" (Record 30).

If Moore didn't give this note till October or September, as he says, it couldn't have been the same note offered to McDonald in June or July, or in the summer. It was perhaps another note.

Moore did not produce the note on examination, although he expected "trouble" from Mrs. Crawford on the land transaction.

Moore represents Monroe as saying in the fall of '76, that he had not recorded his deed, while in fact he recorded it in December, 1875. No reason appears and we can imagine none, why Monroe should make such a statement at that time. And it looks like another of Moore's "inaccuracies." The deed on the files of this court shows this date of record, although the certificate of record was not printed in connection with the deed on this record.

X.

APART FORM THE DOUBTFUL CREDIBILITY OF MOORE, AND IF HIS TESTIMONY BE TAKEN AS TRUE, WE SUBMIT NO RESCISSION OF THIS CONTRACT IS MADE OUT.

Moore's own testimony, in connection with McDonald's testimony and in connection with the receipt of the $240 note, comes to this only, we submit.

That Monroe in his lifetime wished to rescind the contract and said he was willing to do so if he got his money back from Moore and would consider the matter settled (to use Moore's own words) "when he should return the deed to him." Again (to use Moore's own testimony) he, Monroe, wanted the money "He had given him to enter that land."

Then take what McDonald says, (from record, 30) "He told me that he didn't care about the land, and if he could get his money out of Moore he didn't want the land."

Now, what did Monroe do about this matter in his lifetime? He is not here to speak. Let his actions speak for him on this question.

Moore would have us believe that the contract was off between them in September or October, 1876, and Monroe all ready to surrender the deed. He did not do it. Why not? He did not cancel or destroy the note. Why not? He could not have been incited by wrong motives or intentions in not doing so. The only rational explanation is

that he did not consider the contract off or the note cancelled. That he considered them—that they were—both in force, so to remain till Moore had performed on his part. Moore had not done so.

Monroe, in view of Moore's treachery in converting to his own use the money given him to buy land, and in view of the supposed uncertainty as to Moore's getting title to the land in question, would very naturally and justifiably wish to keep his note out of Moore's hands as some assurance that the latter would pay him back what he owed him. This intention would not operate to cancel the note.

That the contract was not performed explains both Moore's conduct (which he in vain attempts to explain) in not calling for the deed, and Monroe's in not delivering it, or cancelling the note. And nothing else, we respectfully submit, is adequate to explain either. If this be true, the contract of rescission was never performed; the contract was never rescinded.

Moore's evidence tends to show that subsequent to the giving of his deed to Monroe an arrangement was entered into between them contemplating the rescission of the bargain. (Without admitting that the ~~truth~~ proof established such a propoosition), we submit that the evidence upon this matter, taken together, tends to show this, that Moore and Monroe agreed together that Monroe would "give back" the deed on the restoration to him by Moore of a note of $240, which note, together with $10 in cash, was the consideration paid by Monroe to Moore for the latter's deed to him; and

that Moore would also pay him $150, which he, Monroe, had advanced to him for the purchase of other lands, which Moore was unable to purchase; that thereupon, pursuant to the arrangement, Monroe received through his wife, who got it from McKay, the $240 note, and Moore gave Monroe his note for $160 (being the $10 and the $150 aforesaid); and it was agreed between them that when the note was paid Monroe should send the deed back or give it up.

We insist that the arrangement was not intended to be carried out on Monroe's part unless and until carried out on Moore's part.

This note was overdue long before Monroe's death; ten or fifteen dollars only was paid on it during his life time; and after his death another payment or other payments were made to a Justice of the Peace with whom it had been lodged, amounting in all to forty or fifty dollars (p. 38 Record). The balance of the note with interest at ten per cent, was not paid until 1881 or 1882 (Moore's testimony Record 39, *when the balance was paid by Moore to Mrs Monroe without telling her what it was for. Indeed Moore expressly testified that he purposely refrained from telling her what it was for* (Record 46-47).

This agreement of rescission therefore was not carried out in Monroe's life time; he might of course had he lived, have accepted the balance due and that would have completed the transaction; he did not.

His widow, by receiving the money, could not have ratified the transaction unless she understood it, and,

as we have seen, she did not; nor if she had, could she have done so as against her children, for she was neither administrator of her husband's estate nor the guardian of her children, except as natural guardian.

The giving of the party's own note is not payment of the debt.

In Vermont it is payment where it is negotiable but the rule is generally otherwise.

See vol. 2, Parsons on Contracts, p. 624, note S.

It is otherwise in Michigan.

Jennison v. *Parker*, 7 Mich. 360.

There is no evidence that the release was to be operative, we contend, till the money was fully paid.

The practical construction of the arrangement (if there was one) by both parties as well as the arrangement as testified to, was that there should be no release until the money was all paid back on Moore's part.

Monroe, so considering it, retained the deed and gave it to his wife (Record 67, 100), *and his wife kept the note intact; and Moore never demanded the deed.*

Moore seeks to prove that the title he gave to Monroe is vacated; but he was to pay certain money within a fixed time, as a condition of the release; in this he was in default when Monroe died.

But we insist that even if this were not a strictly conditional agreement, Moore stands in this court on this question as he would if he were formally applying to the court by bill to compel complainants to release to him.

If he could do that at all, he could not in good conscience ask the parties to take the balance due when a great change has occurred making the property immensely more valuable than it was while he was in default. He is now (by this defence) seeking to carry out a contract when the subject of it is valuable, which he did not wish to carry out when it was of little value.

When he repaid to Mrs. Crawford (formerly Mrs. Monroe) the balance long overdue on that note, she having no knowledge of the meaning of the transaction, the land had become, in his opinion, of greater value.

We submit that the alleged contract of rescission was not carried out until the money had been repaid to Monroe or to some representative of his authorized to receive it, and understanding its significance; nor then, unless done seasonably.

Moore nowhere explains or attempts to account for his tardy payment of the balance to Mrs. Monroe. He neither pleads poverty nor any other excuse whatever. We submit the inference is irresistible that he did not intend to pay, and did not desire to have the bargain cancelled until and unless it became his interest to do so; until then he preferred retaining the unpaid money to having the bargain rescinded; in this, we submit, he was guilty of such laches as would prevent his defence being heard.

Moore having it in his power (on his own theory) to carry out the rescission agreement, did not do it. He cannot, upon this, treat his conveyance as off.

Fry on Specific Perform. 2nd Amer. Ed. §702.

We think the only rational explanation of the conduct of the various parties in reference to the $240 note is this: Monroe was anxious to get this land, if McDonald and McKay should make a deed of it, in accordance with their agreement with Moore. But he was doubtful whether such deed would ever be executed. He was anxious to have the $240 note under his control, so that Moore could not negotiate it. Had Monroe intended to rescind the contract he would unquestionably have destroyed the note. Monroe simply did in retaining the note what a court of equity would have done for him under the circumstances.

If the seller though not the legal ownerh as an equitable means to make himself so, and he employs that means successfully, though after his contract of sale, he may compel specific performance, the vendor cannot rescind the contract of sale on account of the delay of the purchaser in making payment, when the facts throw a cloud on the title and render it suspicious.

The court will not put the vendee off with the personal responsibility of the vendor on the breach of the covenant for quiet enjoyment, but will suspend the payment of the purchase money until defects in the title are removed, and will, after a reasonable time, at the instance of the vendee, rescind the contract. It is a jurisdiction in the nature of specific performance and in the meanwhile allowing the purchaser to hold the security he has in the purchase money.

Waterman on Specific Performance, Sec.419.
Pomeroy on Specific Performance, Sec. 171.

It is said that the fact that Moore continued to pay installments on the $60 note which was owing Monroe, instead of having the amount indorsed on the $240 note, which Moore had given to him, shows that Moore considered the latter note as surrendered and the contract abandoned; but the reply to that is that Moore would not be likely to demand payment of the $240 note before he got a deed for the property, and he would have been likely to demand a return of the deed or a quit claim deed if he had considered the contract as rescinded.

THE MCKAYS' TESTIMONY WITH RELATION TO MRS. MONROE'S ALLEGED DECLARATIONS IN OBTAINING THE $240 NOTE, CONSIDERED.

The defendants' counsel lay great stress upon the testimony of Mr. and Mrs. McKay. Their own statements do not prove any authority on the part of Mrs. Monroe to speak for her husband. Unless, therefore, there is other testimony connecting her with her husband in this transaction, their testimony is of small moment. She flatly denies their statements.

We have endeavored to show that Mrs. Monroe's account of the transaction is consistent and natural. The mere fact that she showed the note to her husband when she returned, and what he said thereupon, does not of itself, we submit, import any original authority from him, especially in the face of the fact that there is no evidence showing that Monroe had ever been informed that the note was

in the possession of either Mr. or Mrs. McKay prior to the time that Mrs. Monroe obtained it.

But Mr. and Mrs. McKay are both exceedingly bitter and hostile witnesses. The reading of their evidence cannot fail to convince one of this. Mrs. McKay testifies that when Wm. McKay left the note with her, he gave it to her *either to keep, to give back to Mrs. Monroe, or to collect*; a statement so utterly improbable that a court would be warranted in excluding her testimony entirely. Moore gave no such instruction to William McKay and William gave none such to her (William McKay's testimony, Record, 91, 92).

She refuses point blank to answer the question as to how much Moore was owing McKay (Record, 21).

McKay wrote Mr. Crawford that he would do all he could to hurt the complainants in this suit (Record, 74, 75).

This he does not deny any further than to say "I don't think I ever did write such a letter".

Again, after promising to go and tell what he knew about this transaction to complainants' attorneys, he refused (Record p. 74). This he does not deny.

XI.

WE SUBMIT THAT LACHES CANNOT BE IMPUTED TO COMPLAINANTS OR THEIR ANCESTOR.

Laches cannot be imputed to the infants.

50 Mich. 575.

Tyler on Infancy and Coverture, p. 159.

As to Monroe in his life time, he was expecting Moore to perfect his title. He had a right to wait for it. Or if it be considered that an agreement of rescission was contemplated, he was expecting Moore to pay the money, to perform the condition on which he, Monroe, had agreed to give up the deed (if he did agree to give it up).

It was Moore that was inactive, not Monroe.

As to Mrs. Crawford, her laches could not be imputed to the infants. But we contend that she was not guilty of laches. As a matter of fact, she asserted her title to the property a year or thereabouts before it was shown to have any great value. The deed to Helen Moore is dated December 16th, 1880. On our theory of the case, nothing could have been done by Monroe or his heirs, till that deed was given. The complainants then lived in Canada. That deed was recorded March 16th, 1881. The complainants were still living in Canada. Mrs. Monroe, when on a visit to Houghton county in the summer of 1881, first learned that Moore disputed her title. In the fall of that year, following the advice of McKay (Record p. 70), on

her return to Canada she went to Port Huron, Michigan, and consulted a lawyer, and he wrote a letter to Moore informing him of complainants' claim. (Mrs. Crawford's testimony, Record p. 70; Moore's testimony, Record p. 40.) February 8th, 1882, this suit was commenced in the circuit court for the county of Ontonagon, Michigan. It thus appears that complainants commenced proceedings in this court about ten months after the deed to Helen Moore was recorded, and about six months after she heard that Moore disputed her rights, and about three months after her attorney had written Moore. Considering that the land was situated a long distance from where complainants lived, and that some time must necessarily be allowed for investigation, we submit that complainants' action was commendably prompt.

We submit that the conclusion of the district judge on this matter is correct, and that there was no unreasonable delay in bringing suit.

In this connection we call attention to the answer of Moore that at the time of his deed to Monroe the land was of uncertain value and not known to be worth more than he paid for it; and that complainants never claimed to have any interest therein until the mineral discoveries thereon, made at the expense of the defendants and of McDonald and McKay, showed it to be worth many times that sum (Record, 5-6).

Unfortunately for the defendants, their answer in this respect is utterly untrue, and nothing in the case more forcibly illustrates the recklessness of Moore.

1. Neither the defendants nor McDonald and McKay had spent one cent in developing this land. It was all done by the Cambria Iron and Steel Company under an option (Record, 40). No discoveries of ore had been made there before the fall of 1881, when complainants informed Moore of their claim, or before February 8th, 1882, when the bill was filed.

2d. The land had not then been shown by actual work upon it to be worth any more than when Monroe purchased. To put this matter beyond dispute we quote the question of Moore's counsel to him and his answer thereto:

> "Q. When was it first *ascertained* that the property had value beyond what you knew of at the time you first went over it for iron ore? A. The spring of 1882 was the first development that was made on the property by the Cambria Iron & Steel company; they had worked considerable on it in 1881, but hadn't shown up anything till the spring of 1882."

McDonald also says that the option was given in 1881 to the Cambria, and that they found ore the next spring, but not in sufficient quantities to pay the price agreed upon, and the option was abandoned (Record, 31 and 32).

We know of no evidence in the Record showing that Mrs. Monroe had any knowledge that the land had increased in value at the time suit was begun, or that she supposed it had increased in value; while Moore, at the date of the deed to his wife, knew that clean ore had been found on the adjoin-

ing section 15, and it is clear that this knowledge enhanced his valuation of the land (Record, 40).

In conclusion we submit that the decree should be affirmed with costs.

T. L. CHADBOURNE,
L. H. BOUTELL,
Of Counsel.

INDEX OF ARGUMENT.

		PAGE.
1.	Statement of facts	1
2.	Constructive trust asserted	5
3.	Defence of Statute of Frauds	13
4.	A written agreement existed between McDonald and McKay and Moore	26
5.	The deed executed by McDonald and McKay and deposited with Viele, a compliance with the Statute of frauds	30
6.	Objection that complainants have no standing to compel deed, treated	35
7.	Sufficiency of bill of complaint discussed	38
8.	The alleged rescission or abandonment, and discussion of the law applicable thereto	43
9.	Moore's testimony discussed as to its reliability and bearing	48
10.	The alleged agreement of rescission not completed	52
11.	No rescission made out	59
12.	Mr. and Mrs. McKay's testimony discussed as to its reliability and bearing	65
13.	Laches	67

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888. No. 700.

NATHANIEL D. MOORE, NATHANIEL D. MOORE, Jr., sole Heir at Law of Helen Moore, deceased, by his Guardian, NATHANIEL D. MOORE; and JOHN McKAY, Administrator of the Estate of Helen Moore, deceased,

Appellants,

against

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE,

Appellees.

ARGUMENT FOR APPELLANTS,

IN REPLY

TO BRIEF FOR APPELLEES,

BY

JOHN F. DILLON.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

Supreme Court of the United States,

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Appellants,

AGAINST

CHRISTINA CRAWFORD, MARY ANN MONROE and JOHN D. MONROE,

Appellees.

Argument of John F. Dillon, for Appellants, in reply to Brief for Appellees.

In this brief in reply I shall consider the points raised by counsel for appellees in his brief, taking them up one by one, as nearly as practicable in the order in which he makes them.

Before replying *seriatim* to his points there is one important aspect of the matter to which I wish to call attention. Referring, on page 13, to the conveyance from McDonald and McKay to Mrs. Moore, December 16th, 1880, he says: "No one will venture to contend

that this transaction was other than a gross and wicked fraud."

I have discussed this question in my former brief and shown, I think, satisfactorily, that under the circumstances this conveyance, even assuming that it was directed and controlled by the husband, not only did not amount to a fraud, legal or equitable, but that it was not even a violation of any moral obligation which Moore was at that time under toward Monroe. Recall the circumstances. In October, 1875, Moore deeded an undivided one-third interest to Monroe. No fraud in this transaction is pretended. Monroe knew that Moore had no title, knew all the circumstances, and said: "I am satisfied with your warranty deed." No possession was ever taken; no improvements made; no taxes paid. On the contrary, the land was sold for taxes, purchased by others, and subsequently conveyed to McDonald and by him to Mrs. Moore.

In July, 1876, Mrs. Monroe got possession of the purchase money note for $240, und r representations (as the Court below found and both the McKays testify), that her husband had sent her for it; took it to her husband, advised him that she had it, and he told her to "put it by." These are indisputable facts. In the same year, 1876, Monroe himself, according to the testimony of McDonald (who this learned counsel says is an honest man, and who has no interest in this transaction), said to him that he did not want the land and would not have it.

In 1880, at the date of the conveyance of this land by McDonald and McKay to Mrs. Moore, it is undisputed that it was worth no more than it was in 1875 That same year McDonald offered another undivided one-

third interest in the same land for $500 and could not get it—exactly the same price which Monroe agreed to pay Moore, except that a sale for $500 in 1880 would have been less than a sale for the same amount in 1875 by the difference between interest and taxes in the meantime. So far the facts are undisputed.

We also claim that in 1876 the whole contract was rescinded and the $10 agreed to be paid back, which was afterwards done.

Mark further the attending circumstances. On their theory they owed at this time $240 and interest from November 1st, 1876. They had possession of the note. The Monroes had left the country. Monroe had gone to Colorado and died in 1878. No executor or administrator had been appointed for Monroe's estate, and, so far as the record shows, he had no estate out of which this note could be collected. Moore did not even have the note or any evidence of indebtedness on the part of Monroe for the land. He did not even know that it was in existence, and did not know that the Monroes put forth any claim to this land or admitted any obligation to restore the note to him.

Under these circumstances it requires a great deal of boldness on the part of counsel to say that the conveyance to Mrs. Moore on December 16, 1880, was a gross and wicked fraud, or any fraud whatever. I have carefully read the testimony, and I venture to state to the Court as a proposition to which they will not, after examination, disagree that any prudent man without the violation of any principle of duty, or even of honor, would or might on the 16th day of December, 1880, honestly and honorably have directed this conveyance to be made to his wife? It would have been an act of

folly under those circumstances to take it himself when it would feed this estoppel and compel him, in order to get the benefit of the rescission and abandonment, to institute a suit in equity against the purchaser.

Counsel for appellees, after partially stating the facts of the case, which statement I submit is neither full nor accurate, even so far as it extends, states what may be called an omnibus proposition (*page 5*):

> " That in consequence of the facts appearing in this case and above detailed, there is an enforceable trust against Helen Moore in favor of complainants as to one-half of the interest conveyed to her, which half was included in the deed from Moore to Monroe."

This proposition is an attempt by counsel, after gathering certain facts, to throw them all together and to state in a general way that they create a trust. But the brief for appellees, from its beginning to its end, contains *no definite statement of facts and of principles of law applicable thereto, out of which a trust can or does arise.* The rules of law, however, in reference to trusts are well settled and well known; and if there is any trust, it is capable of definite and precise ascertainment. Why, then, is there no definite statement of such facts, and principles of law? The answer is, *there is no trust.* The arguments of counsel for appellees chase one another around in a vicious circle, and it is not possible to arrange them in a straight line, beginning somewhere and ending somewhere. There is a 'trust' because there is a 'fraud,' and there is a 'fraud' because there is a 'trust;' " the appellees have 'rights' only *because* there is a 'fraud,' and the 'fraud' consists in depriving them of those

very 'rights,'—this is the sum and substance of the appellees' case.'

For the purpose of making it clear that the facts as proved by the admissible testimony of the record do not create a trust within any principles of jurisprudence, I propose briefly to call attention to the various methods of creating a trust.

A trust may arise from (1) a conveyance expressing a trust, (2) a declaration by the owner that he is a trustee (expressing the trust), and (3) by operation of law.

If the trust arise by conveyance or declaration and relates to property in land, it must be evidenced by a sufficient writing. If, however, a trust arise by operation of law, it need not in all cases be in writing; but whether it must be depends on the statutes of the jurisdiction within which the land is situated. In the present case the Michigan Statutes govern, and certain trusts which in other jurisdictions arise by operation of law are by them abolished.

Trusts by operation of law arise in the following cases—RESULTING TRUSTS:

(1) Where an intended trust cannot take effect, because illegal, &c.

(2) Where an express trust fails to exhaust the entire property transferred to the trustee, the *surplus* results.

(3) Where the legal title is transferred and a trust declared as to a part of the property, and no intention expressed as to the rest.

(4) Where the purchase money is paid by one person and title taken in the name of another. (Abolished by statute in Michigan.)

CONSTRUCTIVE TRUSTS :

(1) Where property is acquired by wrongful use of the property of another, as where a trustee misapplies trust funds, purchasing property therewith.

(2) Where a person acquires an interest in property in regard to which, by reason of his *fiduciary relation*, he has a duty to perform for another, as a partner, agent, executor, trustee, &c.

(3) Trust in favor of a vendee under a contract of sale.

These are the only cases in which a trust can arise by operation of law. It is true, where a person acquires property by fraud, he will be compelled to return it. But in such case there is really no trust. He is compelled to return the property to the one from whom he obtained it *because he obtained it by fraud*, and this is accomplished by means of the equity jurisdiction to remedy fraud.

Now, the present case does not fall within any of the above enumerated cases in which a trust can arise. There was no conveyance expressing a trust, no declaration of trust, no resulting trust, and no constructive trust.

The learned counsel for appellees admits that THERE IS NO PRECEDENT TO SUSTAIN HIS CASE. At page 36 he says :

"WE FRANKLY SAY TO THE COURT THAT WE HAVE NOT FOUND ANY CASE LIKE THIS UPON THE FACTS."

And yet he says there is an "enforceable trust." Is a trust a thing indefinite and unknown? Not at all.

The rules of law with reference to trusts are just as well settled as its rules with reference to any other subject. *If there is a trust in the present case, it is possible to bring before the Court precise and definite principles of law for its ascertainment.* It will not do to state certain facts, and say that the appellants refuse to recognize the "trust" which those facts create; nor further, that the refusal to recognize the alleged "trust" is a "fraud;" but *the appellees must show by the well-known and well-established principles of law just how the facts which stand in the record and are proved by proper testimony create the "trust" which they allege.*

It would be an endless task to notice all the erroneous statements of facts by counsel for appellees and the statements of facts which are proved only by oral testimony, and which are, therefore, not facts in evidence before the Court, and cannot be considered as facts by the Court. His argument begins with just such a statement: "N. D. Moore had the promise of a conveyance of a third interest from McDonald and McKay;" and other similar statements follow all along through the brief.

That statement was not only not proved by writing, but it was not proved even by parol. Thus, the argument for appellees is based upon constantly and persistently assuming the existence of facts which not only are not proved but positively negatived by the record. It is everywhere assumed in the argument

that there was an "*agreement*" between McKay and McDonald on one side and Moore on the other, to convey to him one-third interest in the land in question, and that from the time of the entry of the land McKay and McDonald were "*trustees*" *for Moore's benefit* as to the one-third interest. The entire argument of appellee's counsel is based upon these assumptions, except in the one instance where he seeks to excuse Monroe from the charge of laches in not attempting to establish his title before his death. In discussing this question he says (*on page 67*): "On our theory of the case, nothing could have been done by Monroe, or his heirs, *until that deed was given*" (referring to the deed from McDonald and McKay to Mrs. Moore). In my view, this, while it is a necessary, is at the same time a fatal, admission.

In order to establish their right in the first place, *he must assume the existence of an agreement and a trust*, and he argues strenuously that one is made out by the evidence; but in order to avoid the *charge of laches*, he abandons that whole position and announces that the theory of his case is that there was no right in Monroe, that is, *there was no trust*, and such right did not arise *until the conveyance to Mrs. Moore.*

Counsel for appellees states the following proposition, which shows on its face that it has no application to the present case (p. 5):

"Had McDonald and McKay subsequently conveyed

to N. D. Moore, as they were ready and willing to do, that conveyance would have inured to the benefit of Monroe and his heirs," &c.

It is idle to argue what *would* have happened if the facts had been different.

It is claimed that some of the cases cited by counsel for appellees support the proposition that a deed with a covenant of warranty is a *contract to convey.*

But even if it were a contract to convey, that would give no right to maintain the present suit, for Moore is the only one who made such contract, and he has not now and never had any title, legal or equitable, to the land in question. *He* is not the defendant from whom appellees are seeking to take the title.

But of all the cases cited only the two Georgia cases give any support whatever to such a proposition; and those two cases say that the deed is good as a contract to convey *only in case the grantor has afterwards acquired title.* They furnish no support whatever for the doctrine contended for by appellees that the grantor is bound to *acquire title* and then to convey. And of those two Georgia cases one is only a *dictum* and the other is little if any better; for an estoppel would have secured the grantee the same rights as were actually given.

In *Smith vs. Baker*, 1 Young & Coll., 223, cited in Appellees' brief, there was a covenant for *further assurance;* the grantor afterwards acquired full title; and the Court rightly held that in such a case he was bound to make the *further assurance* which he had expressly covenanted to make.

So, also, in *Chew vs. Barnet*, 11 Serg. & Rawle, 389, there was a covenant for *further assurance,* and

the *dictum* of GIBSON, J., at p. 392, was made in view of that covenant. The decision in that case was *against* the grantee in the deed on the very ground that the grantor did not have, and did not subsequently acquire, the title. The case of *Whitfield vs. Fausset*, 1 Ves., Sen., 387, cited by GIBSON, J., in *Chew vs. Barnet, supra*, does not support the doctrine for which it is cited. In that case Lord Chancellor HARDWICKE said, at page 391: "It (the conveyance) would have operated by *estoppel*," *in case the grantor had afterwards acquired title.*

The quotation on appellees' brief from *Way vs. Arnold*, 18 Ga., 181, is a mere *dictum*. The case was decided on another point.

The only case, so far as I have been able to ascertain by diligent search, which holds that even the grantor (in a deed with a covenant of waranty, *and without a covenant for further assurance*) *who has afterwards actually acquired title* was bound to convey to his grantee, is the case of *Goodson vs. Beacham*, 24 Ga., 150. That case was apparently decided on the strength of the argument by the American editor in his notes to *Doe vs. Oliver* and *Duchess of Kingston's Case*, 2 *Smith's Leading Cases*, 568, *Am. Ed.* The editor there attempts to show that, *in case the grantor afterwards acquires title*, the title in such a case *does not actually pass* by estoppel, but that a second conveyance is necessary. Now, it is clear that even if the grantor afterwards acquired title, it would not *actually pass* to the grantee, and the authorities do not decide that it would, but that the effect is the same *as if* it did actually pass. Possibly the registry acts modify this statement, so that it ought to read "in most cases is the same." But, obvi-

ously, the failure of an *estoppel* virtually (but not actually) to pass an estate to the grantee in case the registry acts intervene, furnishes no ground whatever for a court to change an *executed deed* (which contains no covenant for further assurance) into an *executory contract* to convey. The only remedy in such a case is *the remedy expressly provided in the deed*, namely, *an action for damages for breach of the covenants.*

All of the cases cited by appellees, except those already specially commented on, decide nothing more than this, which it is not necessary to dispute, that a deed with covenant of warranty, or the equivalent covenant for quiet enjoyment merely operates to *estop* the grantor *in case he afterwards acquires the legal title.* None of them in any way give any countenance to the proposition that a deed is a contract to convey.

At page 10 of appellee's brief is the following paragraph :

" We say that since McDonald and McKay made this conveyance to Helen Moore, solely upon the consideration upon which McDonald and McKay's agreement to convey to her husband rested, this being done on N. D. Moore's part in order to defraud Monroe by defeating the operation of the principle of law above noted, contrary to Moore's written obligation to Monroe, the transaction would, in equity, be considered the same as if the trustees *(sic)* had conveyed, as they were willing to do, first to the husband, and he had then conveyed to his wife ; or as if they had conveyed Moore, and that deed had been suppressed by him to and another deed made to his wife at his instigation."

This is a curious combination of erroneous statements of fact and of law. *There was no "agreement" to convey to Moore.* There was only an understanding which did not amount to an agreement. *But there was* NO EVIDENCE *of any understanding even.* Such evidence must be in *writing.* The next statement is, that the conveyance was made "*to defraud Monroe by defeating the operation of the principle of law above noted*" (*i. e.*, the estoppel). It certainly is a novel proposition, that one person can "*defraud*" another by "defeating the operation of a principle of law." The law *operates*, and no one *can* "defeat" its operation, whatever be the acts of the parties. The only question is, *what is the legal effect of the acts which they perform.* If they perform certain acts, certain legal rights arise; while if they perform certain other acts, certain other legal rights arise. The law operates as much in one case as in the other. But the proposition is important in this respect, that it states all there is in the appellees' case, which amounts to this: *if* Moore *had* performed certain acts, certain rights *would have* arisen in complainants; Moore did *not* perform those acts; by not performing those acts Moore did *not* create such a state of facts that the principle of law above mentioned could operate; Moore's *not* doing such acts as *would have* brought into operation the above-named principle of law is a "fraud," and such "fraud" in not performing acts which *would have* given the appellees certain rights, actually gives them those very rights. If such were the law, it would not matter what the acts of the parties were in any case. By not performing certain *other* acts, which if performed *would* give certain rights, the defendants would have "defeated the operation of

a principle of law," and thus have "defrauded" the plaintiff, and such "fraud" would give those very rights!

It is not surprising, therefore, to find that counsel for appellees argues that the Court should decide this case—not upon the facts as they appear in the admissible testimony of the record, but upon certain supposed facts which, if they were true, he claims *would have* given the appellees the very rights which they now seek to obtain upon *the present and different state of facts.* Thus he continues:

> "The transaction would in equity be considered the same *as if* the "trustees" (*i. e.*, McDonald and McKay, who were *not trustees at all*) had conveyed as they were willing to do, first to the husband, and he had then conveyed to his wife, or as if they had conveyed to Moore and that deed had been suppressed by him and another deed made to his wife at his instigation."

All this is presumably based on the maxim that "equity regards as done that which ought to have been done." But this maxim applies only to what one is *legally* (not merely morally) bound to do. *And it is shown at the beginning of this Brief, and at page 112 of my Brief in chief, that there was in the present case no moral obligation.*

If any argument were needed to show the folly of stating in loose terms and as a general rule that which ought to be stated only in qualified terms and, as a rule applicable only in a limited way,—if any such argument were needed, the attempted application of the above maxim in this case furnishes a striking demonstration of it. This maxim is commented on, and a quotation is given from Mr. Justice STORY in regard to it, at page 25 of my former Brief. I call the attention

of the Court to the remarks there made. It is sufficient here to say that that maxim is never applied in the way in which the appellees seek to have it applied in this case. The Court never decrees anything to be done, *unless some right* at law or in equity is first shown. The Court never sits as a moral censor to tell people what they ought morally to do.

The case of *Huxley vs. Rice*, 40 Mich., 73, cited by counsel for appellees (p. 11), does not support the point for which it is cited.

That was a case where Rice occupied a FIDUCIARY RELATION to Huxley (he was Huxley's agent to buy at foreclosure sale), by reason of which he was not allowed to keep the benefit which he had derived from such relation. The premises had all been mortgaged. Afterwards Huxley bought the equity of redemption of part of the premises. When the whole of the premises were about to be sold under and for the mortgage, Huxley, of course, had a right to bid, and he had the further *right not to be influenced by false promises or representations to desist from bidding;* but instead of bidding himself, he, or some one on his behalf and with his knowledge and consent, arranged with Rice to bid for him, and in doing so Rice acted as his agent.

In giving the opinion the Court said:

"According to the clear weight of evidence *the defendant a short time prior to the foreclosure sale and after some negotiations, entered into an oral agreement by which Rice was to provide the means and bid off in*

one body the entire premises covered by the Dodge Mortgage, and take Conveyance from the commissioner in his own name, and immediately release to Cummings his separate parcel, *and likewise release to complainant his portion* upon his payment of his purchase money mortgage in Rice's hands."

In regard to the existence of a fiduciary relation between principal and agent, and the duties which arise from such relation, see *Bigelow on Fraud*, Ed. 1888, pp. 295, 300:

"An agent who purchases property for himself, which he is employed to purchase for another, becomes a trustee for his principal."

Kerr on Fraud and Mistake, Bump's Am. Ed., p. 172, note.

No such fiduciary relation exists between vendor and purchaser.

Bigelow on Fraud, Ed. 1888, p. 262.

Perry on Trusts, § 181, partially quoted by counsel for appellees, supports only the proposition commented on at pages 50 *et seq.* (especially p. 57), of my former brief, that if the property *is obtained from the grantor by fraud upon him*, a court of equity will compel restoration. Further on in the same section it is said:

"But there must be some *actual fraud in procuring a deed or devise to one's self;* the mere breach of a contract to convey is not sufficient."

The case of *Parkist vs. Alexander*, 1 Johns. Ch., 397, was, like *Huxley vs. Rice*, a case where one who occupied a *fiduciary relation as agent* had sought to gain an advantage for himself.

Counsel for appellees says at page 13 :

"No one will venture to contend that this transaction was other than a gross and wicked fraud."

This proposition has already been commented on.

Since the main briefs were printed a few cases have come under my observation which are decisive of the proposition that there was no fraud in the present case cognizable at law or in equity, even if there had been a fraud in morals. One was a case in the Supreme Court of Rhode Island, which was well considered, and in which the complainants amended their bill by charging "fraud," just as the complainants' attempt to do in the present case. I quote the case in full as given in the report :

" Bill in Equity to satisfy a judgment debt out of a right of dower. On demurrer to the bill.

" After the opinion given in this case, *Maxon vs. Gray*, 14 R. I., 641, the complainants, June 11, 1885, amended their bill. To the amended bill the respondents demurred."

" PER CURIAM. Since our former decision in this case the bill has been amended by alleging that the debt for which the complainants recovered judgment was contracted by the defendant, Nancy C. Gray, under an assurance on her part that she would pay it out of her dower, right, or estate, or out of the income and profits thereof and in the expectation on the part of the complainants that she would do so ; and by further alleging, in substance, that the said Nancy, acting fraudulently and in collusion with the heirs, occupies and enjoys the entire estate in which she is entitled to dower, with the consent of the heirs, and refrains from having her dower assigned, purposely, so that the complainants shall not be able to levy their execution upon to. The complainants contend that these amendments introduce the element of fraud required to give the Court jurisdiction.

" The first amendment simply alleges an assurance which may have been given, for anything that appears,

in entire good faith, and we do not think that a failure to fulfill it amounts in law to a fraud. Indeed, we do not see how it puts the widow under any stronger duty, in point of law, than she would have been under without it, by reason of her general obligation to pay her debts, unless it was of such a nature as to bind her estate, and the complainants do not claim relief on that ground. We do not see how the second amendment materially alters the bill. Merely to characterize an act or omission as fraudulent or collusive is not enough, but the allegation must be such that the Court can see, without the epithets, that the act or omission is fraudulent. The allegation here is, not that said Nancy has done anything to put her property beyond, but only that she refrains from doing anything to bring it within, the reach of legal process. We do not think this is such fraud as gives jurisdiction in equity. A debtor, who has property in such form that it is not attachable, is under no legal duty to convert it into a form in which it will be attachable, and in our opinion, mere inaction, when there is no legal duty to act, is not cognizable as fraud in equity, whatever motives may influence the non-acting party."

Maxon vs. Gray, 15 R. I., 475.

Can there be any doubt that this is sound doctrine? And if so, it applies directly to the case at bar, since the gravamen thereof is that Moore failed and refrained from doing something to bring the land within the operation of the covenant in his deed.

Similar decisions have been made in other States, and, if it were necessary, they could be cited by the score. I will give only two, both in Michigan.

In *Smith vs. Rumsey*, 33 Mich., 183, part of the land in suit was exempt as a homestead from creditors' execution. The debtor conveyed this land including the homestead right. The court held the conveyance fraudulent as against creditors, as to that part which was not a homestead, but *not fraudulent as to the homestead.* There was an allegation of fraud in the bill very much

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like the allegation in the bill in the present case (*see Report, pp. 185–186*).

The Court said:

"The grant, in so far as such right (homestead) extended, cannot be adjudged a fraudulent grant as against the complainants in their character as creditors of Rumsey. The point is not whether Rumsey may now, after having, as he claims, ceased to be owner, proceed to insist upon the existence of a present homestead right in his favor, but it is whether, on being charged with a fraud against his creditors, in making conveyance of his homestead, he is not entitled to reply: 'True, it is, I did not mean that you should have my homestead for your claim against me, and I conveyed it, but in your character of creditors you were not thereby defrauded, or even prejudiced, since the law positively forbade your subjecting it against my will either by legal or equitable proceedings, and, moreover, left in me the perfect right to grant it away, provided my wife would join.'"

Smith vs. Rumsey, 33 Mich., 183, 192.
See also *Rhead vs. Hounson*, 46 Mich., 243, to the same effect.

So also in the present case, the grantors, McDonald and McKay, held the land in suit by an absolute right, subject to no legal or equitable claim in favor of Moore or Monroe; and, having that absolute right, they had also "the perfect right to grant it away," and such conveyance did not defraud Monroe or his heirs. Neither was it a fraud in Moore not to bring the land within the operation of the principle of estoppel. As in that case, so also in this one, there was no legal or equitable obligation on McDonald and McKay or Moore to bring the land within the operation of any principle of law which would subject it to any claim, and the *not* doing of that which the law imposes no obligation to do is not a fraud. This reasoning inevitably

leads to the conclusion, so well expressed by Lord BRAMWELL in *Weir vs. Bell*, L. R., 3 Ex. D., 243 (quoted at top of page 59 of my former brief), that:

"*There can never be a well-founded claim of legal fraud, or anything else, except where some duty is shown, and correlative right, and some violation of that duty and right.*"

At page 14 of appellees' brief appears this statement:

"Several sections of the statutes of Michigan are cited relating to the forms necessary to convey or to create trusts in real estate. It is sufficient to say that these statutes except estates and trusts in real estate by act, operation or implication of law."

And as examples of implied trusts counsel mentions *Huxley vs. Rice, supra*, and *Byrne vs. Rood*, 54 Mich., 67. *Huxley vs. Rice* has been commented on *supra*. *Byrne vs. Rood* was a case of actual fraud and misrepresentation, and decided only the familiar proposition that "*a man will not be allowed to keep another man's property which he has obtained by fraud.*"

These were cases of constructive trusts, and it is true that the Statute of Frauds does not require a writing in such cases. But here the appellees show no constructive trusts, or any other trust by operation of law. Before they can show a trust by operation of law, they must show a trust by contract; and that the statute forbids.

It is insisted by counsel for appellees (*page 15*) that McDonald and McKay "waived" the Statute of Frauds and executed the "trust" by conveying to Mrs. Moore.

This is upon the ground that they have *performed the invalid contract* and have *executed the trust.* If so, the trust is valid *only because they have executed it.* If valid only because they have executed it, it is valid only *as they have executed it.* It will not do to say *they have executed the trust, and therefore it is valid and binding upon them, but they haven't executed it* in the manner they ought to have done, *therefore they must be compelled to execute it. What they have done* is unquestionably valid, but you cannot go one step beyond their acts and say that they are obligated to do something *other and different* from what they have done without attempting to enfore some *prior arrangement* not enforceable.

To put the case in its strongest light for appellees, suppose that A orally agrees to convey to B, and then A conveys to C. The conveyance to C is not an execution of a trust under contract of sale to convey to A. Suppose, further, that B has requested A to convey to C. B cannot come into Court and say that A has "executed" the "trust," and has "waived" the Statute of Frauds, and that, therefore, B or any one claiming under B can come into Court and ask the same rights as if A had conveyed to B.

But it is said that Mrs. Moore is in a different situation from a stranger. But that is not so. A married woman *is a stranger* to her husband so far as her right to receive the title to property and to hold it to her separate use is concerned.

It is said, in the appellees' statement of facts (*page 4*), that, after the deed to Mrs. Moore, N. D. Moore managed the property substantially as though it were his own, &c. If that were true it could not create a trust. The property was conveyed to Mrs. Moore absolutely and it was hers. Moore had no possible interest in it, present, past, future or contingent. He had not even the *possible contingency* of *tenancy by curtesy*, that having been long since abolished in Michigan (see *Tong vs. Marvin*, 15 Mich. Rep., 60). Whatever benefit Mrs. Moore might have allowed him to derive from the property, temporarily or permanently, could not affect the question of ownership or create a trust. The entire testimony shows that, not only was there no *written instrument* declaring a trust in Moore's favor, but there was no *oral agreement, understanding* or *intention* of anything of the kind. The present condition of the case illustrates the absurdity of the argument based upon this testimony. Since the appeal of this case Mrs. Moore has died, the property has descended to her *infant child* and N. D. Moore has *no power* to deal with or control the property, or the rents and issues of it, accruing since Mrs. Moore's death, except as guardian, acting under letters from the Probate Court, and *under bonds*. We deny, however, that there is anything in the testimony showing that Moore dealt with the property otherwise than in behalf of his wife, under power of attorney or other authority given him from time to time.

Barber vs. Milner, 48 Mich., 248, cited at page 15, is a case like *Patton vs. Chamberlain, infra*, which decides only the doctrine that, though the Court will not actively interfere to enforce a parol trust, yet, if the parties choose

to execute the trust, the Court will not interfere to disturb what the parties themselves do.

Patton vs. Chamberlain, 44 Mich., 5, was a case where a trust had been created by parol. The trust was afterwards executed *so as to satisfy the statute*, and it was held that intervening creditors (*i. e.*, creditors who were such at the time the trust was executed, but not at the time of the creation of the parol trust) could not complain.

That case does not aid the appellees. The principle established by all the authorities is that *the law will leave the parties just where it finds them* in reference to the Statute of Frauds. If an attempt is made to create a trust by parol, *and the statute is afterwards complied with*, the trust becomes valid and enforceable *by reason of such compliance*. But if the statute is never complied with, a parol trust in land remains forever unenforceable, and the law leaves the owner of the land to do just as he chooses; it will not raise its hand to aid the claimant in any respect whatever.

At the top of page 19, counsel for appellees says:

"The complainants hold N. D. Moore's obligation for a conveyance to them."

That is not true; the deed from Moore to Monroe is *is not an obligation to convey*, but an attempt at a *conveyance itself.*

At page 21, counsel attempts to argue that the conveyance from McDonald and McKay was obtained by fraud *upon them*. Counsel can hardly be serious in such a contention. The facts as shown in the record furnish not a single ground for such argument. McDonald and McKay knew all the circumstances when they made the conveyance, and acted freely in so doing, and there is not a *scintilla* of evidence to the contrary. Moreover, even if there had been any such fraud, it would give appellees no right to maintain this suit. The only persons who could complain would be those who were injured by such fraud, and not those who would have had no right if the fraud had not been committed.

It is claimed (page 24) that the conveyance to Helen Moore was upon a secret trust for Moore. The Court is asked to find this, not because there is the slightest evidence that such a trust existed, but *because Moore had managed the property for his wife*, and derived some benefit from it. An interest in the property was sold; the money came into his hands; he invested it in property, partly in his own name and partly in his wife's name; he bought property in his wife's name also in Milwaukee, whether altogether from these funds or from other funds doesn't appear. Whatever he did, he did in each instance with his wife's consent and approval. He did not, nor could he go one step beyond her consent in any instance. Of course *no trust could*

arise under the Laws of Michigan, except by instrument in writing. Such instrument does not exist. Stress is laid upon the fact that Mrs. Moore was not placed upon the stand as a witness. We never before heard of a party claiming that, *although there was no affirmative testimony*, yet a certain fact was established, because one of several witnesses who might have denied it was not placed upon the stand to deny it. No doubt Mr. and Mrs. Moore were both cognizant of the fact that there was no trust. *N. D. Moore testifies that such was the fact. The burden would be upon the complainants to show that there was a trust.* Why should Mrs. Moore go on the stand to dispute *what the complainants have the burden of proving, and of which they produce no shadow of evidence?*

But even if there had been any such secret understanding, it would not have been a trust; neither could it in any way help appellees, for Moore was under no obligation to acquire the legal title, or to convey to Monroe or his heirs, even if there had been a trust.

It is urged (page 26), contrary to the fact as found by the Court below, that there was an agreement in writing by McKay and McDonald to convey a third interest in the land to Moore.

The *apparent* confidence with which counsel insists upon this does not agree very well with his statement which we have above cited under the head of laches.

(*Appellees' Brief, p. 67*). "On our theory of the case nothing could have been done by Monroe or his heirs, until that deed (to Helen Moore) was given." And his confidence in W. D. McIntyre as a witness to the alleged writing is hardly consistent with the lack of confidence in the same witness, which he states at page 56 as follows:

"*William D. McIntyre's testimony on this head is too confused as to time, and too uncertain in meaning to be relied on.*"

We have discussed heretofore, in full, the testimony bearing on this question, and there can be no doubt that the Judge who heard the case below arrived at the correct conclusion on that point (*Record, p. 134*):

"The arrangement was altogether oral. One witness testifies that it was reduced to writing and signed, but this is denied by the parties to it, and his testimony does not contain any definite statement of the contents thereof. The arrangement was so loose and indefinite in its terms that, aside from any objection resting on the statute of frauds, it would not have warranted a decree for specific performance. Whether Moore was to have one-third or one-fourth interest in the lands does not clearly appear. There seems to have been nothing more than a mutual understanding that McDonald and McKay would do what was right, having reference to the recognized custom to give to explorers one-fourth, one-third, or in some cases a half interest in the lands located by them."

It is urged against this finding that McDonald, Moore, and McKay are not afterwards called to the stand to deny the statements of witness McIntyre. They had already testified that there was no such thing, and it would have been idle to recall them to *reiterate* what they had said before. Moore had testified that he had no contract in writing. It is claimed that that meant

nothing more than that *he had none in his possession.* Such a statement, if the contract had been drawn up and was in existence for his benefit and left in the hands of some other person, *would be as rank perjury as if he had the agreement in his pocket.* Both McDonald and McKay positively say that there was none.

I have claimed that McIntyre is unreliable as a witness. I claim it because his testimony is inconsistent and contradicted by disinterested and unimpeached witnesses, and claim that his testimony is not entitled to the weight that McDonald and McKay's testimony is entitled to, because he is the brother of the complainant—Mrs. Crawford, who is intensely interested—and testifying in her favor. Even counsel for appellees finds it necessary to discredit McIntyre's testimony on another point (*Appellees's Brief, p. 56*).

Counsel asks if Mrs. McKay's testimony is not also unreliable, on the same ground, as she is a sister of Mrs. Crawford. Mrs. McKay, and probably her husband, to some extent, are interested, by reason of their relationship to the complainants, but they would naturally be interested *in favor of the complainants.* Their testimony *against the complainants* is entitled to all the more weight, because it is against a presumed interest they would feel in favor of their relatives.

On page 29 it is said :

" In this connection, Judge DILLON in his brief, at page 22, says : ' Later he (McIntyre) testifies (*Record, p. 86*), that he did not see the agreement.' *There is no such testimony on page 86, nor elsewhere in the Record.*"

The number of the page (86) is an error. It should

be page 59, about twelve lines from the bottom. McIntyre there said:

"He (Moore) drew up the writing, *and I didn't see it*, but the rest all signed it."

It is, therefore, true that there *is* such testimony in the record.

The deed partly executed and left with Viele was not a compliance with the Statute of Frauds.

The last resort of the complainants, after having wholly failed to sustain any of the allegations of their bill, is to claim that the *partly executed, undelivered* deed left with Viele was a compliance with the Statute of frauds.

This proposition is made with apparently little confidence in its soundness, even by counsel himself. It is the straw which the drowning man clutches at; and, like the straw, it fails to save.

Counsel himself says *(p. 30)*:

"It is frankly admitted that the authorities do not agree as to whether a deed under such circumstances is a compliance with the statute."

On the contrary, I shall show conclusively that the authorities *do agree*, that a document like the "Viele deed" is *not* a compliance with the statute."

THE "VIELE DEED," EVEN IF IT WERE A COMPLIANCE

WITH THE STATUTE OF FRAUDS, IS IMMATERIAL TO THE DECISION OF THIS CASE.

The defense does not rest alone upon the fact that Moore had no enforceable contract with McDonald and McKay. Even if there had been such enforceable contract, the appellees have no right whatever to the land in suit.

All that is stated in points IV., V. and VI., pages 70–125 of my former brief would not be in the least affected, even if the "Viele deed" had been a compliance with the Statute of Frauds; and the matter there set out at length constitutes a series of perfect defenses.

The only effect of the deed from Moore to Monroe was to render Moore liable in damages on his covenants (but this was to Moore's *executor, not to his heirs*). That deed was *not* in any sense *an executory contract to convey;* it was *a conveyance itself.* It is true it failed as a conveyance; but *the only remedy is the one which was expressly stipulated by the parties, namely, on the covenants which were inserted in the deed.* That deed contained *no covenant for further assurance;* and the covenants which it did contain are *not executory covenants to convey.* They merely gave *the right of action for damages for breach.*

Moore was, therefore, under no obligation, legal or equitable (and I have already shown that he was under *no moral obligation*), *either to take a title himself or convey to Monroe's heirs, the appellees.* Mrs. Moore was not a party to the deed, and was not estopped by its covenants. That deed, therefore, is wholly insufficient to sustain the appellees' case; and, as that deed is the only foundation on which they base their claims, their whole case falls.

BUT ANOTHER SUFFICIENT DEFENSE *is, that even if that deed from Moore to Monroe could be regarded as a contract to convey, still the appellees have, for many reasons, no equity to enforce it.*

The contract for the purchase of the land was *expressly rescinded.* But even if that be not admitted, still the appellees have no equity to call for specific performance. The granting of a decree for specific performance is always a matter resting in the discretion of the Court, even after the complainants have shown a complete contract which would be sufficient in an action for damages at law. If any circumstances make it unjust or inequitable to compel specific performance, a court of equity will not decree it. In the present case the appellees have not shown sufficient even to maintain an action at law. *There has been no performance or offer to perform on their part.* But when they come into a court of equity to ask a decree for specific performance they show no equity whatever. On the contrary, the undisputed facts as they appear in the record show that they have no equity, either moral or legal, to ask for the intervention and assistance of this Court. The testimony shows conclusively that Monroe had completely abandoned the purchase of the land; that he had recovered back the $10 which he paid on account of it, and the unpaid $240 note which he had given in part payment; that the note had never been paid, and no offer of payment had ever been made; that Monroe had said repeatedly that he did not want the land; and that he never made any claim to it from the time of getting back the $240 note in 1876 to the time of his death in 1878. The testimony further shows that Monroe's heirs, the appellees, made no claim

whatever to the land till the summer of 1881, at which time it was reported that the Cambria Iron Company had struck ore. It was at this time that Mrs. Monroe announced to McKay her intention to try to get the land, saying that "*it would serve him* (Moore) *right to get beat out of it*" *(Record, p. 25)*.

For a further discussion of these points, see my main brief, pp. 70–125, and the beginning of this brief.

I now proceed to show that the "Viele deed" was *not* a compliance with the Statute of Frauds.

THE "VIELE DEED" WAS NOT A COMPLIANCE WITH THE STATUTE OF FRAUDS.

Appellees' brief upon this proposition starts out with the following wholly unwarranted premises, viz.: *1st.* "This deed evidences the whole contract between the parties;" *2d.* "Moore had fully performed;" *3d.* "There is no doubt as to what their parol agreement was prior to the execution of the deed."

It is not correct or true that the deed evidences the whole contract between the parties.

We say this, because,

First. It appears conclusively, as found by the Court below, and as positively testified to by the first witness, McDonald (who testified *on behalf of the complainants*), that THERE WAS NO AGREEMENT, nothing beyond a mere reliance by Moore that McDonald "would do what was right." And this was based upon an indefinite understanding that explorers usually got an interest—sometimes a quarter, sometimes a third, and sometimes one-half. See opinion of Court, *Record, p. 134* (McDonald's testimony, *pp. 15 and 16*).

McDonald says (*p. 15*): "*I never agreed to give him anything.*"

Second. Aside from there being no agreement whatever, *even the alleged "understanding" of the parties was not set forth in the deed. In fact there is* NO EVIDENCE AS TO THE CONTENTS OF THE "VIELE DEED," except that as drafted it was from McKay and McDonald to Moore for *an* interest in the land, and even this evidence was incompetent, and cannot be considered.

Even if Moore had performed, that fact is immaterial; for there was no such performance as to take the case out of the Statute of Frauds, in which event only could performance by Moore become material. But it is incorrect to say that Moore had fully performed. Performed what? If there was no contract, what had he fully performed? If there was a contract, it was void under the statute, and the evidence thereof is inadmissible. Appellees' counsel recognize this, but endeavor to escape from the difficulty by saying, "The *deed* evidences the whole contract." If this be so, it is pertinent to inquire what were the terms "of the whole contract," as shown by competent evidence as to the contents of the deed? Did the draft deed set forth that Moore must first pay McDonald for a pony he had bought from him; that he must settle certain other accounts; that he must arrange certain business matters with McKay? Did the draft deed describe this particular land; did it set forth any consideration, paid or to be paid? *Not a single question was asked, and not a witness testified as to the contents of the deed.* It is all left to a mere inference to be gathered from the incompetent testimony relative to the original indefinite understanding.

Notwithstanding these facts stand out clear and unquestioned by the evidence, counsel for appel-

lees state boldly as their premises that, "The deed evidences the whole contract;" that "Moore had fully performed;" and that "there is no doubt what their *parol agreement* was prior to the execution of the deed." It is a remarkable claim to make, when there is not a witness in the case (except W. D. McIntyre, who testified to a written agreement), that even admits the *existence* of a parol agreement, but, on the contrary, it is distinctly denied, as we have shown by the record. *And besides, all there is of a parol understanding is wholly incompetent under the statute, and stands before the Court the same as though it had not been given.*

Moore never saw the deed or heard of it, and it would not have been sufficient as a memorandum if he had known of it. This is the testimony of all the witnesses who testify regarding this partly executed deed. Even the counsel does not claim that it was ever delivered. It is urged by counsel that Moore must have known of its execution, because he was expecting to have a deed, and so informed Monroe. But the infernce is not justified by the premises. Because a man expects to receive a deed at *some time*, does not tend to show, of itself, that he knows one is already executed. If there could be such an inference, it is wholly dispelled in this case by the fact that he was not present, by his testimony that he knew nothing of it whatever, and that there is no testimony bringing home to Moore any knowledge of the execution of such, or any deed.

It would be a strange rule to hold, that where a party, under no legal or equitable obligations, goes to a notary, and has a draft of a deed partly executed (the grantee therein not even being present), and leaves express directions that it shall not be delivered

and it never is delivered, that such partly executed conveyance is admissible in evidence to prove all the terms of a complete contract which had never been entered into by the parties.

After making these general comments I now proceed to a somewhat detailed argument in which I shall show, first, that the "Viele deed" was not a compliance with the Statute of Frauds; and second, that even if that deed were a compliance with the Statute of Frauds, that fact would not give appellees any rights.

It is possible to comply with the Statute of Frauds in regard to contracts concerning land (1) by *making* a contract in writing or (2) by *reducing to writing* a parol contract already made. The "Viele Deed" was clearly not a compliance with the statute by the first method. Was it by the last? Clearly not.

(a) There was no contract of which a memorandum could exist. Such was the opinion of the Court below (*Record, p. 134*):

"The arrangement was so loose and indefinite in its terms that, *aside from any objection resting on the Statute of Frauds, it would not have warranted a decree for specific performance.* Whether Moore was to have one-third or one-fourth interest in the lands does not clearly appear. There seems to have been nothing more than a mutual understanding that McDonald and McKay would 'do what is right,' having reference to a recognized custom to give to 'explorers' one-fourth, one-third, or, in some cases, one-half interest in the lands located by them."

There must be complete contract, such as would be enforceable if it were not for the Statute of Frauds, either before the memorandum is made or the parties must assent at least by parol to the contract as stated in the memorandum. McDonald and McKay could not then reduce to writing any *contract* with Moore, for they had made none. An indefinite understanding, even if reduced to writing by only one of the parties would remain an indefinite understanding still. The proof is clear that Moore did not know of and did not assent to any statement of a contract contained in the "Viele deed."

(b) The "Viele" deed was not produced in evidence, and no foundation was laid for proving its contents.

It nowhere appears that any effort was ever made by the complainants to obtain the deed itself, to be used in evidence, and no testimony was introduced to show its loss or destruction or the inability of complainants to obtain it, and thereby lay the foundation for proof of its contents.

All the testimony there is upon the subject is by John McKay (*Rec., p. 23*), in which he says: "I inquired of Viele about it and he said he didn't know what had become of it; that it was lost." This is the testimony of our own witness, and even his casual inquiry of Viele was not made in behalf of complainants—they have done nothing to procure the deed or show its loss.

This is clearly insufficient under any rule of evidence, in that it does not appear that Viele made any search for the paper; it does not appear even at what time this conversation with Viele took place. It must be remembered that this testimony of John McKay was taken January 8, 1885, and the testimony of McDonald

in behalf of complainants relative to the deed was taken January 4, 1883, two years before. So that, even if it were a fact that the deed was lost and could not be produced in 1885, possibly it might have been produced had any effort been made in 1883. This clearly would render McDonald's testimony as to the execution or contents of the deed wholly incompetent.

But aside from that fact, we submit that the mere statement by a witness, that the person in whose custody a writing had been left, said he didn't know what had become of the writing—that it was lost, in no sense complies with the rule, relative to the foundation necessary to be laid to permit oral evidence of a written instrument. The rule is:

> "*The party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him.*"
>
> *1 Greenl. Ev., Sec. 558.*

But in this case there is no evidence that complainants ever even inquired of Viele for the deed, nor that Viele ever made any search for it. Parol evidence of the contents of the deed was therefore clearly inadmissible, and this objection was made when the testimony was taken.

(c) *Even if a foundation had been laid for receiving secondary evidence of the contents of the "Viele deed,"* ITS CONTENTS HAVE NOT BEEN PROVED, AND NO ATTEMPT EVEN HAS BEEN MADE TO PROVE THEM.

The contents of the deed were absolutely unknown so far as the record shows, except that there was oral testimony as to:

(*a*) The name of the proposed grantee.

(*b*) The names of the proposed grantors (but whether they both signed or not is left uncertain, even by the oral evidence) ; and

(*c*) That the proposed deed was intended to convey *some* interest in certain land. *What* interest is not shown even by oral testimony (see testimony of McDonald, *Record, p. 13, bottom*).

As to the remainder of the contents of the "Viele deed" we are left in utter ignorance, for there is no testimony, not even oral testimony, as to any other of the contents than as above stated.

So far then, as the oral testimony to the contents of the document shows: (1) The *consideration* (*i. e.*, Moore's services) was not stated; (2) the *thing* sold (whether a third or a quarter) was not stated ; and (3) who *signed* the document is uncertain ; (4) while, as to the remaining contents of the document nothing whatever is known.

It cannot seriously be claimed that such a document is a sufficient memorandum in writing to satisfy the Statute of Frauds. So far as proved, even by parol testimony, not one of the essential terms of a contract were set out ; indeed, *no contract whatever* was set out in the document. It is true that in some deeds there is a recital of a bargain and sale, but there is no necessity for such a recital in a deed, and there is no evidence that there was any such recital in the "Viele deed." Nor is there any evidence that the true consideration (*i. e.*, Moore's services), or that any consideration,

was recited in the "Viele deed." It cannot be said that the consideration *must* have been mentioned, for it is not necessary in a deed to mention a consideration; it is sufficient to declare a use. Although a nominal consideration *may* have been mentioned, there is no evidence that it *was* mentioned; and, further, even if a consideration of whatever kind had been mentioned it would have been *no evidence of a contract*, for it would have been equally consistent with a *gift*.

A deed, therefore, does not necessarily prove any *contract*; and though if it were drawn in a certain form, it is conceivable that it *might* prove a contract, there is not the *scintilla* of evidence even by parol, that the "Viele deed" contained any statement of a contract.

(*d*) *The full contents of the "Viele deed" were not shown, and a part only of a document cannot be separated from the rest and used in evidence.*

Even if what was proved by oral testimony had been a complete memorandum of *some* contract, *it could not be received in evidence so long as the full contents of the document were not proved*, for the remainder of the contents which were not proved may have essentially modified and rendered conditional the part which had been proved. *A document must be proved in its entirety* so that it may be interpreted *as a whole*. It is not permissible to prove *part* of the contents of a document, and from such proof say that the *document as a whole* proves that which would be proved by a part.

(*e*) *The "Viele deed" cannot, as a memorandum, be aided by oral testimony.*

The rule is a familiar one that a contract cannot rest partly in writing and partly in parol.

Even if the deed had been fully executed by agreement of the parties thereto, and had been so far delivered as to be admissible in evidence as a written memorandum of agreement, sufficient for a full compliance with the Statute of Frauds, it could not be aided by oral testimony. If used as a memorandum of agreement it would be subject to the rule "that the writing should be the evidence, and *the only evidence*, of the contract, and that there should be no occasion to look beyond it."

Wood on Statute of Frauds, Sec. 384.

As oral evidence cannot be received to establish the terms of the contract, but all the terms must appear from the writing itself, let us strike out all evidence relative to the alleged contract except what appears in the draft deed itself, and then inquire what was the alleged agreement in all its terms between Moore, McDonald and McKay, as set forth in the deed. But the record is silent as to the contents of that uncompleted instrument.

As to the so-called "Viele deed," then, we submit:

1. It was never signed by all the grantors.

2. It was never beyond the direction and control of the grantors.

3. It was not made by mutual consent or agreement, as Moore never knew of its existence.

4. It was not admissible as a memorandum, under the statute, because (*a*) there was no contract. (*b*) The "Viele deed" was not in evidence, and no foundation was laid for secondary evidence. (*c*) Its contents have not been proved, even by oral evidence. (*d*) It cannot be used as a memorandum because its contents were

not fully shown. (*d*) The "Viele deed" cannot as a memorandum be aided by oral testimony.

I propose now to examine the authorities cited by appellees to support the proposition that the "Viele deed" was a compliance with the Statute of Frauds, and to cite authorities to show that it was *not* a compliance with such statute.

The case of *Urann vs. Coates*, 109 Mass., 581, furnishes no support whatever for the proposition stated. That was a case of a *declaration of a trust*, and *not a case of a contract to sell* land, and different rules apply to the two cases. The only question in *Urann vs. Coates*, was whether the trust had been perfectly created, and the decision was to the effect that a *declaration of trust* in land is valid if made in writing, even though it be not communicated to the *cestiu que trust*, and the writing be not delivered to him. But nothing in the "Viele deed" so far as its contents were shown could by any possibility be construed as a *declaration of trust.* The question raised by counsel for appellees with regard to the "Viele deed" is, whether it was good as a *memorandum of a* CONTRACT.

Bowles vs. Woodman, 6 Grattan, 78, seems to be the case out of which the *dicta* in the cases cited by counsel for appellees have arisen. That case is *not a decision* to the effect that a draft of a deed, signed but never delivered, constitutes a memorandum to satisfy the Statute of Frauds. *The decision in that case was against*

the purchaser, on the ground that the facts showed that it would not be equitable to decree specific performance. The remark of ALLEN, J., in that case is, therefore, nothing but a *dictum*, and no authority is cited by him to support it.

But, even if the *dictum* could be regarded as sound law when applied to the facts in that case, it does not apply to the present case. The facts are not the same. In that case the draft of the deed was in evidence, being filed as an exhibit with defendant's answer (*see report, p. 82*). The contents of the deed in that case were before the Court, and whether or not it stated fully the terms of the alleged contract was a matter of fact which the Court had the means of deciding. In the present case the "Viele deed" was *not* produced in evidence, and even if it be admitted (and it is not), that the absence of the deed was sufficiently accounted for so that parol evidence of its contents might be introduced, still, *the evidence as to the contents of the deed* is not sufficient to show what it really contained. Giving to all the evidence its full significance, the most of its contents that can be claimed as proved is that there was a draft of a deed; that it was drawn for the purpose of afterwards making it effective as a conveyance to Moore; that it was to convey *some* interest in the land in Section 16. *What interest does not appear.* That it was signed by McKay, and possibly, but not certainly, by McDonald and his wife, but not signed by Mrs. McKay, and that it was drawn up some time about 1875.

It seems idle to argue that such a draft of a deed proved only by parol evidence, and that, too, about ten years after the draft was made, is sufficient as a memorandum to satisfy the Statute of Frauds.

Neither does the case of *Parrill vs. McKinley*, 9 Gratt., 1, *decide* that a draft of a deed is a sufficient memorandum to satisfy the Statute of Frauds. *In that case, too, the decision was against the purchaser.* The same Judge (ALLEN) gave the opinion as in *Bowles vs. Woodson*, 6 Gratt., 78, and the only authority cited for his *dictum* in the later case was his own unsupported *dictum* in the former case. But the point was not involved in the decision, and would not have been even if the contract had been enforced, for there was sufficient part performance by possession, &c., to take the case out of the Statute of Frauds. But the contract was for other reasons not enforced.

Hart vs. Carroll, 85 Pa. St., 508, is not a decision of the proposition stated by counsel for appellees, but so far as any opinion is expressed by the Court is *directly against* the claim that the "Viele deed" was a compliance with the Statute of Frauds. This is clear from the quotation to be found on appellees' brief, thus: "*It could not serve the purpose of averting the operation of the Statute of Frauds,*" and: "Its production in evidence could have been enforced * * * *not to avoid the statute.*"

If counsel for appellees had continued his quotation a little further, we should have read this statement, which is what the case decided and all that it decided: "Rigid as the rules are that are prescribed for this class of controversies, it is still the law that '*where a parol contract of sale is precise as to the terms and subject matter, and the vendee has taken possession in pursuance of it, and made valuable improvements, with the assent of the vendor, it is not within the Statute of Frauds.*'"

In that case the vendee had had *possession for four-*

teen years, and had made *valuable improvements*, which was a *part performance* sufficient to take the case *out of the Statute of Frauds*, and there was no question of a memorandum involved in the case.

In *Jenkins vs, Harrison*, 66 Ala., 34 , cited by appellees, the draft of a deed *was fully set out* either by copy or original, and its terms were thus in evidence before the Court. There was, too, in addition, a memorandum of the contract, and at page 360, the Court considered that the memorandum and the deed might be read together to satisfy the statute.

Thayer vs. Luce, 22 Ohio State, 62, cited by appellees, was also a case where there was, besides the deed, a memorandum of the contract, and the Court held that the draft of a deed might be read with the memorandum, and thus satisfy the Statute of Frauds.

This case not only fails to support the claim of appellees, but denies the correctness of the remarks of the Judge in the two Virginia cases above cited. The Court uses the following language (*p. 75*):

"And as to the objection that this deed was never delivered, we may admit, as an abstract proposition, *that an undelivered deed is no evidence* of a subsisting *contract between the parties named therein*, notwithstanding cases to the contrary" (6 Grat., 78; 9 Grat., 1).

These two cases, then—one in Alabama, and one in Ohio—are authority only for the proposition that a draft of a deed may be put in evidence to help out a defective memorandum. It is sufficient to say that no such question is involved in the present case.

Campbell vs. Thomas, 42 Wisc., 437, was a decision *against* the claimant, and *against* the proposition contended for by appellees in the present case.

In that case the Court said:

"They agreed verbally, the plaintiff to purchase and *Thomas* to sell, on certain terms, which included the execution of a mortgage on the land, by the plaintiff, to secure the payment of a portion of the purchase money. But such verbal agreement was a nullity, by the Statute of Frauds, there having been no such part performance of the agreement as would take it out of the statute. There was no valid contract, unless the same, or some note or memorandum thereof, expressing the consideration, was in writing, and subscribed by Thomas (R. S., Ch. 106, Sec. 8). The only writing subscribed by Thomas, which relates to any such contract, is the deed he deposited with Judge Hand. That instrument expresses a consideration, and, if it contained the whole contract, we should have no difficulty in holding that it answers the requirements of the statute. But the difficulty is, that the deed does not contain the whole contract. It is essential to the plaintiff's case to maintain, and he does maintain, that he was to give *Thomas* his notes for a portion of the purchase money, and was to execute his mortgage on the land in controversy to secure the same. No note or memorandum in writing of this portion of the agreement was made, and the same still rests in parol.

"The contract expressed in the deed deposited with Judge Hand is a contract to sell and convey the land—the whole title thereto, absolutely, and without any reservation whatever, to the plaintiff, for a specified sum of money. But proof of such a contract is not sufficient to entitle the plaintiff to judgment."

Campbell vs. Thomas, 42 Wis., 437, 441.

These are all the cases cited by counsel for appellees in support of the proposition that the "Viele deed" was a compliance with the Statute of Frauds. Every one of them might have been decided without any expression of opinion that an undelivered deed was good as a memorandum to satisfy the Statute of Frauds. The opinions expressed, so far as they lend support to such a proposition, were, therefore, mere *dicta;* they

were, moreover, expressed in regard to a state of facts wholly different from that which is disclosed by the record with regard to the "Viele deed." The *writings themselves* in all of these cases were actually offered in evidence. In the present case the "Viele deed" itself was not offered in evidence; no foundation was laid for secondary parol evidence, and the parol evidence offered did not show what were the contents of the deed.

Cagger vs. Lansing, 43 N. Y., 550, is a decisive authority *against* the proposition that the "Viele deed" was a compliance with the Statute of Frauds, even if there had been (as there was not) a parol contract with reference to which the statute might be complied with. In that case it had been decided by the lower Court that a deed delivered as an escrow was a compliance with the Statute of Frauds (see *Cagger vs. Lansing*, 57 Barbour, 421). But that decision was reversed by the New York Court of Appeals.

The Court of Appeals said:

"The counsel for the respondent insists that the deed executed by the intestate and delivered in escrow is a contract for the sale of the land executed by the intestate. This position cannot be sustained. *The deed purports to be a conveyance of all the intestate's interest in the premises for a consideration therein expressed of $1,000, but is* WHOLLY SILENT AS TO THE TERMS OF THE CONTRACT *pursuant to which it was made.* If delivered to and accepted by the defendant, it would have operated as a conveyance, *but it would be resorted to in vain to find evidence of the contract pursuant to which it had been delivered*, as it contains no recitals of any agreement or other reference thereto."

A Mississippi case deals with the proposition that an

undelivered deed is good as a memorandum in the following way:

"The only question necessary to be considered is, whether the signing of the deed, under the circumstances, is a sufficient note or memorandum of the contract to satisfy the Statute of Frauds."

"*We have been able to find no case in which a writing signed by a party, and kept in his possession, without delivery to the other party, has been held to be a compliance with the statute: and it would appear strange that such a paper could have that effect, when it is entirely within the power of the party to destroy it and prevent its being used as evidence of the contract.* The cases cited to sustain this contract are not analogous to this. They are cases of memoranda made by auctioneers, and delivered to the purchaser, which are held to be sufficient, because the auctioneer is the agent of the vendor, touching the purchase, and stating the particulars of it, and in the possession of the vendee. A case has been referred to in 6 Grattan, 78, as showing the sufficiency of the writing in this case. But we have not had access to the authority, and being unable to perceive the reason upon which it proceeds, we cannot give our assent to it. It appears to us that when thepaper has never been delivered, and cannot be produced by the party seeking the benefit of it, it could have no more effect, with reference to the Statute of Frauds, than if it had never existed; because the vendee could not have the benefit of it without the aid of parol evidence to show its terms—and that would be to fall into the very mischief which the statute intended to prevent."

"*But there is another reason of much force why the deed in this case should not be considered as sufficient under the statute; and that is, that it does not appear that the contract, as intended, between the parties, is evidenced by the deed, or that the deed was intended as a complete memorandum of the contract.*"

"We think therefore, that the deed was insufficient as a memorandum under the Statute of Frauds, and that it was erroneous to decree a performance in virtue of it."

Johnson vs. Brooks, 31 Miss., 17.

None of the text writers support such a proposition as is contended for by counsel for appellees.

"*And generally it is held that where the writing is a private one or kept by the maker in his own possession, it cannot be treated as a memorandum* or admission of the agreement, but an instrument so drawn as to recognize the obligation, though not for that special purpose, will, *if it be delivered to the other party and accepted by him,* suffice for a memorandum under the statute."

Browne on Statute of Frauds, § 354.

In *Comer vs. Baldwin,* 16 Minn., 172, 176, the Court said:

"But it is claimed by the plaintiff that although the delivery of the deed may not have been sufficient to pass the title to the land, yet it was sufficient to constitute a contract in writing, the specific performance of which the plaintiff is entitled to enforce. This position cannot be sustained, *for, to render a written contract to convey land operative, it is just as essential that the contract, or memorandum of the contract required by the Statute of Frauds, be delivered, as that a deed be delivered in order to convey title to the land.*"

In *Reed on the Statute of Frauds,* from which counsel for appellees quotes, it is said:

"Where, however, the deed does not evidence the contract further than by conveying the subject matter thereof, the rule is that the deed is not a memorandum under the statute, because its office is not to furnish evidence of the agreement, and in fact in many, if not in most cases, does not do so fully. *A deed in the fulfillment of the contract, not the evidence of it.* In another case it was said, that the deed *is evidence of the final consummation of some contract* previously made, but it is *not evidence of* WHAT THE CONTRACT WAS, and has nothing to do with it further than to carry it out."

Reed on the Statute of Frauds, § *338.*

The above is said in regard to a document which is a deed having been *delivered.*

In Section 388, the same author says (and see cases there cited) :

" A delivery of a deed in *escrow* is not sufficient to make it a valid memorandum."

But a deed is not even " evidence of the consummation of some *contract.*" It may be the consummation of a *gift.*

As to the requisites of a memorandum, Mr. Chancellor KENT, in *Parkhurst vs. Van Cortlandt*, 1 Johns. Ch., 273, said :

" The memorandum appears to be utterly defective. *It ought to have stated the terms of the contract with reasonable certainty, so that the substance of it could be made to appear, and be understood from the writing itself, without having recourse to parol proof.* This is the meaning of the statute and without which the beneficial ends of it would be entirely defeated."

" If the memorandum is to be understood as promising to sell or lease to the plaintiffs at their election, yet *the terms of such sale or leasing are omitted, and it is altogether uncertain to what extent, on what condition or for what price the parties meant to contract.* UNLESS THE ESSENTIAL TERMS OF THE BARGAIN AND SALE CAN BE ASCERTAINED FROM THE WRITING ITSELF, OR BY A REFERENCE CONTAINED IN IT TO SOMETHING ELSE, *the writing is not a compliance with the statute. The cases to this point are decisive.*"

After citing many authorities, he continues :

" And I am warranted in considering it as a settled principle that if the Court cannot ascertain, with reasonable certainty, the terms of the agreement *from the writing or from some other paper to which it refers, the writing does not take the case out of the statute.*"

" *It appears to be equally well settled, that, when the agreement is thus defective,* IT CANNOT BE SUPPLIED BY PAROL PROOF, *for that would be at once to open the door*

to perjury, and to introduce all the mischiefs which the Statute of Frauds and Perjuries was intended to prevent."

"The plaintiffs" *(just as in the present case)* "*have gone into parol proof of negotiations and conversations prior to and at the time of* the date of the agreement to remove the ambiguity on the face of it, as to the meaning of the preference which was to be given, and also to ascertain, with some convenient certainty, the sense of the parties as to the terms of the purchase or lease. *But I apprehend the rule to be too reasonable, and too well settled, to be now disturbed, that when an agreement is reduced to writing, all previous negotiations are resolved into the writing as being the best evidence of the certainty of the agreement. * * * It has been already observed that parol proof cannot be resorted to to supply what may be uncertain and defective in the writing.*"

The same principles were stated and applied by this Court in *Williams vs. Morris*, 95 U. S., 444, 456:

"*Unless the essential terms of the sale can be ascertained from the writing itself,* or by reference in it to something else, *the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof.*"

Answer to Point VI., page 35.

The single question is whether *Monroe was bound* at the time of his death. The question is not whether Moore *could* have acquired the title before the death of Monroe, but whether he actually *had* the title; not whether Moore *could* have put himself into a position so that the contract would be binding upon Monroe at the time of his death, but whether Moore *was* in such a position

that Monroe *was* bound. If Monroe was not bound, then, at his death, a right of action for breach of the contract went to his executor or administrator, and no right whatever went to his heir. To allow the heir any right of action whatever would be to subject the vendor to two suits for the same cause of action, one by the heir and another by the executor or administrator (*see Waterman on Specific Performance*, § 5). It is no answer to say that there is no danger of a suit by the executor or administrator in the present case. The Court cannot say that; it has no means of knowing judicially any such fact, and it cannot suppose it. Neither can the Court deprive the executor or administrator of any right which passes to him upon the death of the testator or intestate. If it were at all doubtful *which* of the two had the right of action in the present case, a bill of interpleader might have been filed to decide such question. But the authorities leave no doubt whatever, and a bill of interpleader would be demurrable.

This is of course under the supposition that the deed from Moore to Monroe can be construed as an executory contract to convey. But it clearly cannot be so construed. Under the deed, as a deed, no right passed to the heir because the ancestor had no seizin at the time of his death, or at any time; but a right of action for breach of the covenants went to the executor or administrator.

Fry on Specific Performance, § 702, cited by counsel for appellees, refers to a rescission of a contract, and has nothing whatever to do with the argument in connection with which he cites it.

For a further discussion see my former Brief, pp. 90-98.

The argument of counsel for appellees (*pages 36 and 37*), assumes that *Moore* has the title, and is the real party defendant in this suit. But that is not true. Mrs. Moore (and since her death her son and heir) is the *real* party defendant, and is not bound by any covenant in Moore's deed to Monroe. *Van Ranseller vs. Kearney*, 11 Howard, 297, there quoted, gives no countenance whatever to the proposition that a deed is a contract to convey. It expressly says that the effect is that of an *estoppel* of the grantor.

Counsel (at page 38) makes an attempt to show that, notwithstanding the case alleged in the bill was abandoned at the hearing, and necessarily so for want of proof to support it, still there is sufficient fact alleged in the bill, aside from the facts not proven, to warrant relief on the ground now claimed. We have discussed this, probably at sufficient length. It will be observed, however, in looking over the facts, counsel still relies on, that the *essential ones fail*, for total want of proof. It is both alleged and proven that *Moore made a deed to Monroe of one-sixth interest;* that McDonald and McKay *became the owners in fee* of the entire property, and that they *afterwards conveyed to Mrs. Moore*, at the request, or by the consent, of N. D. Moore. The allegation that *McDonald and McKay held in trust for Moore* is entirely without proof. The allegation that the title vested in Mrs. Moore *as trustee for Moore and Monroe and his heirs*, is entirely without proof. The bill sets up, by the operation of an estoppel, a legal title in the heirs of Monroe, but shows a *defect in the record chain* of title. The only appropriate relief that can be claimed from the facts stated is to *supply that defect in*

the chain of title. Failing to establish the right to the title at all, of course their claim to relief fails.

Counsel says that the conditions and terms of the trust need not be set forth, because, *it was executed.* The trust was oral and invalid. As we have before insisted, if the trust *is executed*, there is no cause of complaint. But, in fact, *there was no trust* to be executed.

A large number of authorities are cited (*page 43 et seq.*) to show that in order by oral testimony to set aside a deed the testimony must be clear and satisfactory, or, as is sometimes said, beyond a reasonable doubt.

The cases do not apply. *Appellants are not seeking to set aside the deed;* but the appellees are seeking to make it effective as a conveyance. No title passed by that deed, and we are not in court asking to have the deed annulled; it is null already. Appellees say that certain equities arose from that deed, and they are the ones who seek to acquire title in this suit. In answer to them I say, that the equities which they claim arose from the deed, *if they ever existed* (and we deny that they did), have been lost by the rescission or abandonment of the contract of sales by Moore and Monroe, and by the conduct of the parties. And I say (*pages 90–98 of my former Brief*) that even if they existed down to the time of Monroe's death, with his death they ceased to exist.

It would seem as though what are called inconsistencies (pages 48, 52), between Moore's answer and his testimony are unworthy of notice.

The answer is a pleading drawn by the attorney and not by the party. Every one who has had any practice knows how that is usually done. The client states to his attorney the main facts in the case, and the attorney from that draws the answer. Where the answer, as in this case, is not to be sworn to, precise accuracy in the statement of mere details is not considered, nor is it essential. The answer is a pleading. All the so-called discrepancies referred to by counsel are of matters entirely immaterial, such as would be natural, and were in this case filled in by the attorney in drawing the pleading, and would not necessarily be noticed by the party in signing the document, if indeed he took the pains to read it before signing. What matters it whether Moore received $150 to enter land which he might thereafter look up, or to enter a piece of land which he already knew; or whether it was understood that at the time of rescission Monroe was to quit claim to him or send back an unrecorded deed. The essential thing was that the bargain was at an end. Monroe was not to pay his money, nor was he to get the land.

If Moore had been disposed to manufacture his story of testimony, he would certainly have made it correspond with the statement in the answer; but the answer was drawn by the attorney and not under oath; his testimony was given by himself and under oath, and whatever the result might be he felt bound to testify in accordance with the fact, although, as before remarked,

whatever way it was would make no possible difference with the result of the suit.

So much is made of the fact that in drawing the answer, a thing was described as taking place about a month after, when on recollection it appears to have been six months or more, and that something else was done soon after when it was a longer time than counsel thinks ought to be considered soon.

Whether the note was surrendered by McKay and his wife according to previous instructions or without previous instructions, is of no consequence. It is quite likely that in drawing Moore's answer, the attorney assumed that it would not have been delivered up without Moore's instructions, and so inserted it on his own responsibility. But when Moore comes to testify he testifies according to the fact.

Again, it is said that Moore is not to be believed, because his attorney in drawing his answer, which Moore signed, sets up that the note was delivered up and *cancelled*, whereas it turns out not to have been cancelled but *produced in Court intact*. Whether the term "cancelled" is appropriated, is not worth while to discuss. That Moore consented that Monroe might get it and be released from liability, and that Monroe did get it and keep it, with the understanding that he was released from liability, is certain. At the time of the pleading Moore had no reason to suppose that it was in existence. Its existence was not known until 1885, when it was produced in evidence, and then, it will be seen at once, that all right of action had expired by limitation. One must be hard pressed for discrediting circumstances to attempt to discredit a witness

because under those circumstances he had signed an answer setting forth that the note had been cancelled.

Again, it is said that Moore and Monroe lived within three miles of each other from the time of the settle- until July, 1878 (*p. 41*), and it is inconsistent with Moore's position that he, during all that time, did not ask and urge Monroe to give up the deed.

Moore explains why he did not urge it during the time they did live within reach of each other; but the time was not as stated. Three or four months after the settlement Moore was injured by an explosion, by which he was confined to his bed for over two months. In about one year after that he went to Felch Mountain, about 150 miles from where Monroe resided, and remained there until after Monroe had gone to Canada. He did not know when Monroe went. He had neglected, for something over a year while he lived near Monroe, to urge the surrender of the deed, for the reasons he gives, and when Monroe was about to leave Moore was ignorant of the fact, so that there was no opportunity to see him before he went and get the deed.

To discredit Moore (*Brief, p. 54*) counsel says that Moore first (*Record, p. 49*) says McKay first told him the note had been delivered to Monroe about a year after the rescission, and then (*Record, p. 50*) that it was not till after the commencement of the suit. A little closer reading of the testimony would have enabled the counsel to avoid this and many other similar mistakes. What he says on page 50 is that they first *told him, after this suit was commenced*, that Monroe *had the note before the time of the agreement of rescission.*

Under point IX. (*page 52*), counsel for appellees states that it is necessary to show that the agreement for rescission was *completed*. No authority is cited for this proposition; but on the other hand there are many authorities cited on the briefs for appellants to show that *it is sufficient that the parties treat the contract as abandoned*, though no *formal rescission* is ever made. But the recission was as a matter of fact complete except as to the getting back of the deed. Surely neither *Monroe nor his heirs* can complain that Moore did not get his deed back. *Moore* was the one to complain, and even he is not complaining. The only necessary thing in regard to the rescission is that *Monroe wholly abandoned* PERFORMANCE OF THE CONTRACT ON HIS PART. *It is not essential to show a complete contract of rescission.* The abandonment takes away the equity to have specific enforcement, which is not a matter of right, but which lies in the discretion of the Court, although the contract be perfectly good to sustain an action for damages at law.

In reply to point X., I refer to the main briefs, where it is clearly shown that in every essential respect Moore's testimony as to a rescission or abandonment of the contract is fully supported, and that such abandonment is made out independently of Moore's testimony.

Statement of counsel (*p. 66*) that Mr. and Mrs. McKay are exceedingly bitter and hostile witnesses has no foundation except in his imagination. The only reason for making the statement is that their testimony is exceedingly damaging to complainants. They do not approve of Mrs. Crawford's course in attempting to get what does not belong to her, but there is nothing to show any enmity or any desire to do otherwise than to help her in all proper ways.

Mrs. McKay refused to answer how much Moore was owing McKay, because it was no concern of the counsel or of his clients, and the fact was immaterial.

The statement that McKay wrote Crawford that he would do all he could to hurt the complainant is utterly unfounded. Crawford, the complainant's husband, testified to that under objection, not producing the letter, although admitting that he then had it in his house. He afterwards testified that he was unable to find it.

McKay denies writing such a letter (*Rec., pp. 89 and 90*).

At page 69 it is said:

"We know of no evidence in the record showing that Mrs. Monroe had any knowledge that the land had increased in value at the time suit was begun, &c."

I need only refer to the testimony of John McKay (*Record, p. 24*) to show that the very thing that incited Mrs. Monroe to make this claim to the land was that the Cambria Company had in May, 1881, gone in to explore the land, and by the summer of 1881 it was reported that a find of ore had been made, and people began to think the land of some value. Mrs. Monroe began then (in the summer of 1881) to claim the land, but did not file this bill till February, 1882, about which time it was known that the land had great value.

For a more extended discussion I refer to my main brief.

JOHN F. DILLON,
For the Appellants.

Dec. 28, '88.—60.

130-142
130-142

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 132.

BULLITT COUNTY, PLAINTIFF IN ERROR,

vs.

W. T. WASHER, JACOB DANENHAUER, AND PETER BAECKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED OCTOBER 16, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 132.

BULLITT COUNTY, PLAINTIFF IN ERROR,

vs.

W. T. WASHER, JACOB DANENHAUER, AND PETER BAECKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
"Exhibit A."—Contract between Bullitt, Co. Ky., and W. T. Washer, July 8, 1878	12	4
Change of contract	15	5
Transfer of contract by W. T. Washer to Jacob Danenhauer & Peter Backe, Aug. 29, 1878	16	6
"Exhibit B."—Commissioner's certificate of amount of work done, &c., December 25, 1878	16	6
"Exhibit C."—Notice of county attorney to W. T. Washer, December 10, 1878	17	6
Summons	18	7
Marshal's return	19	7
Order filing demurrer	19	7
Demurrer to petition	20	8
Order sustaining demurrer	20	8
Order taking motion for rehearing under advisement	21	8
Order granting time to file amended petition	21	8
Order filing amended petition	21	8
Amended petition	22	9
Order filing demurrer to amended petition	32	12
Demurrer to amended petition	33	12
Order sustaining demurrer to amended petition	33	12
Judgment	34	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 5, 1888.

	Original.	Print.
Opinion of the court	34	13
Order filing mandate of Supreme Court of the United States	36	13
Mandate of the Supreme Court of the United States	36	14
Order setting aside judgment, &c	39	15
Order filing answer and reply	40	15
Answer	40	15
Exhibit—Record of the Bullitt county court in the Pond Creek Bridge matter	56	20
Reply	76	29
Order taking motion to file second amended petition under advisement	85	31
Order to file second amended petition	85	31
Second amended petition	86	32
Order filing rejoinder and answer to second amended petition	88	32
Rejoinder to second amended petition	89	33
Answer to second amended petition	90	33
Trial commenced	93	34
Trial continued	94	35
Verdict	95	35
Judgment	95	35
Order setting motion for new trial for hearing	95	35
Grounds for new trial	96	36
Additional grounds for new trial filed	102	38
Credit on judgment entered	102	38
Order overruling motion for new trial	103	38
Order fixing time to file bill of exceptions	103	38
Additional grounds for new trial	103	38
Order filing bill of exceptions	104	38
Bill of exceptions	104	39
Contract sued on	107	40
Change of contract	110	41
Transfer of contract	111	41
Copy of contract kept by Ridgway	111	41
Change on copy of contract kept by Ridgway	115	43
Letter of W. Carpenter to Jas. W. Ridgway, Dec. 10, 1878	116	43
Clerk's certificate	118	44
Writ of error	120	44
Bond	121	45
Citation	124	46
Proof of service of citation	125	46
Assignment of errors	126	47

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the city of Louisville on Monday, February 16th, 1885.

W. T. WASHER, JACOB DANENHAUER, and PETER BAECKER, Plaintiffs,

vs.

BULLITT COUNTY, Defendant.

Be it remembered that heretofore, to wit, on the 31st day of December, 1879, came the plaintiffs, by Harlan & Willson, their attorneys, and filed in the clerk's office of said court their petition against the above-named defendant; which petition is as follows:

Petition.

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

W. T. WASHER, JACOB DANENHAUER, & PETER BAECKER, Plaintiffs,

vs.

BULLITT COUNTY, Defendant.

2 The plaintiffs, W. T. Washer, Jacob Danenhauer, and Peter Baecker, state that they are citizens of the State of Indiana, and that the defendant, Bullitt County, is a county municipal corporation, organized under the laws of and a citizen of the State of Kentucky, and that the matter in dispute in this action exceeds the sum or value of five hundred dollars ($500), and that heretofore, to wit, on the 8th day of July, 1878, in pursuance of and conformity with the authority of certain orders of the Bullitt county court, the county law-making body of said county, organized in accordance with the laws of the State of Kentucky, the said Bullitt County, through J. W. Ridgway, a commissioner on behalf of said county, thereto duly authorized, of the first part, and the plaintiff, W. T. Washer, of the second part, made and entered into, executed, and delivered a contract in writing of that date, by which said

3 Washer agreed and undertook to erect for said county an arched stone bridge across Pond creek, between Bullitt and Jefferson counties, in the State of Kentucky, which bridge was to be built according to plans set out in said contract, which is filed herewith as part hereof, marked "Exhibit A," and is referred to for further particulars.

By said contract said Bullitt county agreed and promised to pay said Washer for masonry $5.30 per cubic yard, and for cleaning ground, &c., and filling in the embankments 17¾ cents per cubic yard. There were certain other provisions in said contract not necessary here to be recited. Said contract was also signed by one Horine as a commissioner for Bullitt county.

Subsequently, by consent of all the other parties to said contract,

a change was made in said contract and in some of the specifications, not material here to be recited, which was written on the same paper with said contract and which will be seen by inspec-
4 tion of the contract, filed herewith as aforesaid.

Plaintiffs also state that the plaintiffs, Danenhauer and Baecker, were sureties for the faithful performance of said contract by said Washer according to its terms and specifications, and the defendant has a copy of the contract executed by the parties in which they were such sureties.

The copy of the contract filed by plaintiffs is the one given by said county, through its said commissioner, to said Washer, and was duly executed and agreed upon by all of the parties thereto, and defendant is called upon to produce the same herein.

Plaintiffs further state that after the execution of said contract, and relying upon its terms and provisions, the plaintiff Washer, at the special instance and request of said Bullitt county and of the Bullitt county court, entered upon the work of building of said bridge in accordance with the terms of said contract, and purchased and removed to and near to the site of said bridge, at very
5 great cost and trouble, stone and other material to be put upon said bridge and horses and carts and tools to be used in the construction thereof, and employed men and proceeded with the construction of said bridge according to said contract.

Plaintiffs further state that thereafter, on the 29th day of August, 1878, the said Washer, for a valuable consideration, by a written endorsement upon said contract, transferred and assigned the said contract, together with all the moneys and profits due or to become due upon the same, to his coplaintiffs, Jacob Danenhauer and Peter Baecker, which transfer was received, approved, and accepted by said Bullitt county and said Danenhauer and Baecker.

Plaintiff- further state that under said contract said Washer performed labor and services, expended money, and furnished materials amounting to the sum of five thousand three hundred and twenty-five dollars and fourteen cents ($5,325.14), to wit, $836\frac{4}{10}$ yards of masonry, at five dollars and thirty one-hundreths ($5.30) per
6 yard, four thousand four hundred and thirty-two dollars and ninety-two cents ($4,432.92); $14\frac{3}{4}$ yards stone, cut and delivered, fifty-seven dollars and twenty cents ($57.20); 2,748 yards earth, at $17\frac{3}{4}$ cents, four hundred and eighty-seven dollars and seventy-seven cents ($487.77); iron bridge, three hundred and forty dollars and seventy-five cents ($340.75); freight on same, six dollars and fifty cents ($6.50); all of which will more fully appear by inspection of the certificate of J. W. Ridgway, a commissioner appointed for said Bullitt county by the Bullitt county court and by it duly authorized to contract for and superintend the construction of said bridge and to examine the work done thereon, and to decide whether it was done according to contract, and to accept and receive the same for said county; and the said Ridgway, as commissioner, did examine and approve said work so done and receive and accept the same for said county. Said certificate, in writing, dated December 24th,
7 1878, is herewith filed as part hereof, marked "Exhibit B;"

and said county, through its said commissioner, accepted and received said work done under said contract.

Plaintiffs state that under said contract said Washer was to be paid in cash as the work was done, and that according to the terms of said contract there was due to said Washer and his coplaintiffs, as his assignees, on December 10th, 1878, from said Bullitt county said sum of five thousand three hundred and twenty-five dollars and fourteen cents ($5,325.14), which said Bullitt county agreed and promised to pay to said Washer and his said assignees; but, notwithstanding its said promise, it has hitherto failed and still fails and refuses to pay the same or any part thereof except the sum of one thousand and eight hundred dollars ($1,800), leaving a balance due thereon of thirty-five hundred and twenty-five dollars and fourteen cents ($3,525.14); but plaintiffs say that of this
8 amount three hundred and forty dollars and seventy-five cents ($340.75) is due to the Smith Bridge Co. for the iron bridge named in the expense account above set forth, and that at the request of said Smith Bridge Co. and by consent of plaintiffs and defendant the said Smith Bridge Co. has agreed to look to Bullitt county for said payment, and plaintiffs consented that Bullitt county should pay said Smith Bridge Company the said sum, leaving the balance due upon the work performed by plaintiff- of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3,184.39).

That on said 10th day of December, 1878, said defendant, through the presiding judge of its county court and its county attorney, notified and compelled plaintiffs, without plaintiffs' fault, to quit work on said bridge, as hereinafter set forth, and delivered to plaintiffs, through plaintiff Washer, the written communication filed herewith, marked "Exhibit C."

9 Wherefore plaintiffs pray judgment against said defendant, in the name of said Washer, for the benefit of said Danenhauer and Baecker for said sum of fifty-three hundred and twenty-five dollars and fourteen cents ($5,325.14), subject to the credits above recited, to be satisfied upon the payment of said balance of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3,184.39), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1878, until paid, together with their costs in this behalf expended.

2. The plaintiffs state that they were proceeding to finish said bridge according to said contract, and were ready and willing to do so, and had made all arrangements necessary therefor, but that upon the 10th day of December, 1878, without any fault of these plaintiffs or either of them, the defendant, Bullitt County, through W. Carpenter, the presiding judge of the county court of said Bullitt county, thereto duly authorized, wrongfully and in violation of
10 said contract notified plaintiffs to stop work immediately under said contract by a letter written by the county attorney of said county in the name of said Carpenter as presiding judge of the Bullitt county court, which is filed herewith as aforesaid, marked "Exhibit C," and that plaintiffs were thereby wrongfully forced and

compelled, without fault on their part or either of them, to suspend and did suspend said work.

Plaintiffs state that said order of Bullitt County, through its said officer, compelling plaintiffs to stop said work was in violation of said contract, and that but for said wrongful interruption of the work under said order and notice from said Bullitt County they would have completed the work and have fully performed the contract, but that by reason of said order and notice and requirements of the defendant they were compelled to stop and did stop work as aforesaid.

And they further state that but for said wrongful interrup-
11 tion and termination of said contract by the defendant plaintiffs would have made a profit in putting up said iron bridge of fifty ($50) dollars; also a profit on thirty-five hundred yards of earth-work not done of 2¾ cents per yard, or ninety-six dollars and twenty-five cents ($96.25), and that by reason of the interruption of said work plaintiff Washer was compelled to make numerous trips to Shepherdsville and to waite and keep men under him employed and loose their and his own time while awaiting for the final decision of said matter by the Bullitt county court and its consultations with the Jefferson county court, and by reason of said violation of said contract and delay and loss of time the said plaintiffs have been greatly damaged, to wit, in the sum of five hundred dollars ($500.00).

Wherefore plaintiffs pray judgment in the name of said Washer for the benefit of his said assignees against said Bullitt county
12 for the said further sum of five hundred dollars ($500.00), and for their costs, &c.

HARLAN & WILLSON,
Attorneys for Plaintiffs.

Augustus E. Willson, being duly sworn, on oath says that he is one of the attorneys for plaintiffs in the foregoing petition; that each and all of said plaintiffs are absent from the county of Jefferson and from the State of Kentucky, and affiant believes the statements of the foregoing petition to be true.

AUGUSTUS E. WILLSON.

Subscribed and sworn to before me by Augustus E. Willson this 31st day of December, 1879.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

"EXHIBIT A."

Exhibit "A," referred to in the petition, is as follows:

This contract, made and entered into between the county of Bullitt, in the State of Kentucky, by J. W. Ridgway, com'r, on her behalf, of the first part, and W. T. Washer, of Perry county, Ind., of the second part, witnesseth:

13 That the first party has this day contracted with the second party to erect an arched stone bridge across Pond creek at the Brauner foundation site, which said creek is the dividing line between the counties of Bullitt & Jefferson, said bridge to be built according to the following specifications:

The arch 25-feet span, semicircular in form, with radius of 12.6; the *sheeting* to be on boath beds, and joints to be cut according to circle (as shown on plan signed by W. T. Washer), which is made part hereof; the foundation to be 24 feet wide and 10 feet deep, and to be built six feet high for arch to spring on; the sing stones to have a draft round the face 1 inch wide; headers to be not less than 1.8 long, and stretchers not less than three feet; to be all well bound together, and headers and stretchers so distributed in the wall as to make a good bond—at least one header to every 10 feet of wall—and so arranged that the headers on the next above will be placed between the twoo headers in the course below; all the walls

14 in the wings to batter 1 inch per foot in height; the wing wall to be 6 feet wide and carried up to the height of 24 feet, then the parapet wall to commence at a line with the top of bridge floor to the height of 3.6, with coping cap as shown in said plan.

The second party is to keep the fill made as the masonry is being built, so that it will become solid between the walls; the mortar to be twoo parts clear, sharp sand and one of cement; the courses to be all well bedded in mortar; all break joints to be at least one foot in length.

The bridge to be good and substantial and the work done in a workmanlike manner, to be accepted by the party of the first part, by her commissioners aforesaid; and the second party agrees to build said bridge according to the foregoing specifications at the following rates, which the first party agrees to give when said work is completed and accepted, viz:

For masonry, five dollars and thirty cents per cubic yard,

15 including cleaning of the ground, &c; for fill- in the embankment, 17¾ cents per cubic yard; and the party of the second part, with Jacob Daunhauer and Peter Bacher, his surety-, covenants to and with the first party in the penal sum of five thousand dollars for any loss or damage the first party may sustain by reason of any fault on the part of the second party to perform the covenants and contract herein expressed.

It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party guarantees the payment of the whole work to the second party.

Witness our hand- this 8th day of July, 1878, as commissioners of Bullitt Co., Kentucky.

J. W. RIDGWAY.
JAMES HORINE.

Change of Contract.

It is agreed that a change shall be made in the above specifications as follows, to wit: All reference in the above specification to

stone-work shall read stone abutments on the same foundation and the same kind and character of masonry; the abutments shall be 26 feet high, and a wrought-iron truss bridge on said abutments, according to the specification, plans, and *stran* sheets filed herewith as part hereof, at the price of ten dollars per foot.

(Signed by) J. W. RIDGWAY.
W. T. WASHER.

Transfer of Contract.

TROY, IND., *August 29th*, 1878.

I hereby transfer the written contract, together with all moneys and profits due or to become due on the same, to Jacob Daunhauer and Peter Backe, to be held by and belong to them until all the notes endorsed by *these* for me are fully paid and satisfied.

W. T. WASHER.

Exhibit "B" referred to in the petition is as follows:

EXHIBIT "B," with Petition.

Amount of Work Done on Pond Creek Bridge—Contract by W. T. Washer.

836 4/10 yards masory at $5.30 p. yd.	$4,432 92
14 3/10 yds., cut & delivered	57 20
2,748 yds. earth, 17¾	487 77
Iron bridge	340 75
Freight on same	6 50
	$5,325 14
(Forward)	$5,325 14
Paid on contract	1,800 00
	$3,525 14

Leaving balance due on contract from Bullitt county of thirty-five hundred and twenty-five and 14/100 dollars.

Dec. 24th, 1878.

J. W. RIDGWAY,
Commissioner for Bullitt County.

Exhibit C referred to in the petition is as follows:

EXHIBIT "C". Filed with Pet.

Mr. W. T. Washer:

You are hereby notified that Bullitt county will not be responsible or pay for any work that you may do on the Pond creek bridge

after the service of this notice. You are therefore notified to stop all work on said bridge immediately. This stop to take advisedly, with a view of compelling Jefferson county to do her part in building said bridge. All work must be immediately stopped or
18 proper proceedings will be instituted to stop same.

December 10th, 1878.

W. CARPENTER,
P. J., B. C. C.
F. P. STRAUS,
County Attorney.

Upon which petition there issued the following process, viz:

Process.

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summon Bullitt county to answer, on the first day of the next February term of the circuit of the United States for the district of Kentucky, to be held at the city of Louisville, a petition against it in said court by W. T. Washer, Jacob Danenhauer, and Peter Baecker, and warn it that upon its failure to answer the petition will be taken for confessed or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

19 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 31st day of December, in the year of our Lord, 1879, and of our Independence the 104.

SAMUEL B. CRAIL,
C. C. C., K., D.
By HENRY F. CASSIN, *Deputy.*

Upon which process the marshal made the following return:

Marshal's Return on Sum's.

Executed this process on Bullitt county by delivering a copy thereof to W. Carpenter, he being the county judge of said county, at Shepherdsville, Bullitt county, Ky., January 3d, 1880.

R. H. CRITTENDEN, *U. S. M.*,
By P. S. MORRIS, *Deputy Marshal.*

Order Filing Demurrer.

And afterwards, at a term of our said court held for its Feb-
20 ruary term, 1880, to wit, on the 23d day of February, 1880, came the defendant, by James Speed, Esq., its attorney, and filed its demurrer to the petition herein, which demurrer is as follows:

Demurrer to Petition.

In the United States Circuit Court, 6th Circuit, Kentucky District.

W. T. WASHER, &c., Plaintiffs,

vs.

BULLITT COUNTY, Defendant.

The defendant, Bullitt County, demurs to the petition of plaintiffs because said petition does not state facts sufficient to constitute a cause of action against this defendant.

F. P. STRAUS,
County Attorney for Bullitt County.
JAMES SPEED,
RODMAN, BROWN & MEYBER,
For Def't.

Dem'r Sustained.

And afterwards, on another day of said term, to wit, on the 28th day of February, 1880, came the parties, by their attorneys, and, the court being now fully advised of the demurrer to the petition
21 herein, it seems to the court the law is for the defendant. It is therefore considered by the court that the said demurrer be, and the same is hereby, sustained, and the plaintiff- may have leave to amend their petition.

Motion for Rehearing on Dem'r, &c.

And afterwards, on another day of said term of our said court, to wit, on the 3d day of March, 1880, came the plaintiffs, by A. E. Willson, Esq., their attorney, and moved the court for a rehearing upon the demurrer herein, and the court, not being advised thereof, takes time.

Time to File Am'd Petition.

On motion of plaintiffs, by their attorney, three weeks time is given them in which to file an amended petition herein.

Amended Petition Filed.

And afterwards, to wit, on the 24th day of March, 1880, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court their amended petition herein, which amended petition is as follows:

22 *Amended Petition.*

W. T. WASHER and Others, Plaintiffs,
against
BULLITT COUNTY, Defendants.

The plaintiffs, W. T. Washer, Jacob Danenhauer, and Peter Baecker, by leave of court, amend their petition herein and state that long before the contract sued on was made the county court of defendant, duly organized as a county court, with a majority of the magistrates present, deemed it necessary to erect a bridge at the place and across Pond creek mentioned in petition, and thereupon appointed a commissioner and notified the county court of the adjoining county, Jefferson county, and requested it to appoint a like commissioner, which it did; and the commissioner so appointed met with the Bullitt county commissioner at the place proposed for erecting the bridge and agreed on a plan for the same and contracted for the erection thereof, and under said contract the erection of said bridge was begun and the
23 Brauner foundations mentioned in petition and in the contract filed with petition were built, but at that point the work was stopped; that before work was begun under the contract mentioned in petition the owners and occupants in possession of the lands approaching the said bridge on both sides of Pond creek appeared in open county court and relinquished of record the right of way to and across said bridge, and that said Bullitt county before said work was begun under said contract had and held and has since held and still holds in possession said right of way for the public road to and across said bridge over said lands, and did so own it at the time when said contract here sued on was made; and thereafter, before the said contract was made, the county court of Bullitt county, being composed of the presiding judge and a majority of the justices thereof, appointed commissioners and notified the
24 Jefferson county court thereof and requested it to appoint like commissioners to contract for said bridge, which said Jefferson county court did, and said commissioners met at the place proposed for erecting said bridge and at the place mentioned in the said contract, but could not and did not agree upon a plan for erecting said bridge nor contract for the erection of said bridge; that said Jefferson county court did not refuse to appoint commissioners; that thereupon the county court of Bullitt County, the defendant, composed of the county judge and a majority of the justices of said county, decided that it was necessary to erect said bridge, and, having exhausted all means provided by statute for securing the aid of Jefferson county in building said bridge, decided to erect said bridge.

And thereafter, to wit, on the 16th day of July, 1877, the Bullitt county court, composed and organized of its presiding judge and a majority, to wit, all, of the justices of the peace of said county,
25 met and entered of record the following order, to wit:

"It is ordered that 600 dollars be appropriated, to be paid out of the county levy of Bullitt county, for the purpose of erecting a bridge across Pond creek, at the Brauner foundation site, to be levied at the November court of claims, 1877, and J. W. Ridgway, the commissioner herein, is directed to report any bids that may be offered and the amount of such bids, if any are made. W. Carpenter, county judge, is authorized to receive bids and accept or reject same as he may think proper, looking to the interests of Bullitt county and Jefferson county in the matter."

And thereafter, in pursuance of said order, said Commissioner Ridgway reported plans and specifications for erecting said bridge and the bids that were offered and the amount of said bids, and among others the bid of plaintiff Washer; and thereupon W. Carpenter, the county judge named in said order, received the
26 bids so reported and accepted the bid of said Washer.

That thereafter, to wit, on the 19th of November, 1877, the county court of Bullitt county entered of record the following order, to wit:

"It is ordered that James W. Ridgway be appointed commissioner on behalf of Bullitt county to contract for the building of a bridge across said creek at the place heretofore selected as a site, and he will report to court on the matter;" which order was entered by W. Carpenter, as county judge.

That the bridge intended by said orders is the same bridge named in the contract sued on, hereinbefore mentioned; and thereupon and in pursuance of said orders and in conformity with the terms, provisions, and conditions of said bid of Washer, reported by said commissioner and received and accepted as aforesaid by the county judge, W. Carpenter, said Ridgway, as commissioner for defendant, executed and delivered the contract sued on, and thereupon
27 plaintiff Washer under said contract entered upon the performance of the work therein contracted for and performed the work, as shown by the petition; that during the progress of the work it was well known by the Bullitt county court and by the said judge and a majority of the justices thereof that said Washer was doing said work under said contract, the terms and tenor of which were well known to said judge and justices, and that thereafter, to wit, on November 18th, 1878, the Bullitt county court, composed of the judge of the county court and a majority of the justices of the peace of Bullitt county, with the full knowledge that the work and services set forth in the petition had been done under said contract, recognized and ratified said contract by the following orders, which were then made and entered of record, to wit: "It is ordered that a tax of 5 p. c. upon each one hundred dollars' worth of taxable property of Bullitt county be levied for the purpose of paying
28 for the erection of a bridge across Pond creek, to be collected by the sheriff of Bullitt county as other revenue tax is collected. The amount of property to be ascertained from the assessors' books to be returned for the year 1879, and the tax to be collected for said year.

"It is ordered that Jacob Danenhauer and Peter Baecker, assignees

of W. T. Washer, contractor, to build a bridge across Pond creek be allowed the sum of twelve hundred dollars ($1,200.00), to be paid out of the 5 p. c. levy this day made."

Plaintiffs state that by said order said Bullitt county levied a tax of 5 cents on each one hundred dollars of taxable property in said county to pay for the erection of the bridge, and that the bridge named in all of said orders of said Bullitt county court quoted above was the same bridge mentioned in the petition, and the Danenhauer and Baecker are the plaintiffs herein, and said order was
29 made because of and in consideration of the contract sued on.

Plaintiffs state that said bridge was necessary for the use of the people and travel of Bullitt county; that said proceedings had and orders and contract so entered into by defendant were valid and binding upon it. Plaintiffs, when they filed the petition, believed and alleged on information that defendant had assumed the cost of the iron bridge, $340.75, but defendant's officers now deny this, and plaintiffs withdraw their allegations in the following words of the original petition: "Or any part thereof, except the sum of one thousand and eight hundred dollars ($1,800.00), leaving a balance due thereon of thirty-five hundred and twenty-five dollars and fourteen cents ($3,525.14), but plaintiffs say that this three hundred and forty dollars and seventy-five cents ($340.75) is due to the Smith Bridge Co. for the iron bridge named in the expense account above set forth, and that at the request of
30 said Smith Bridge Co. and by consent of plaintiffs and defendant the said Smith Bridge Co. has agreed to look to Bullitt county for said payment, and plaintiffs consented that Bullitt county should pay said Smith Bridge Co. the said sum, leaving a balance due upon the work performed by plaintiff- of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3,184.39)."

Plaintiffs also withdraw their allegations in the following words of the petition, viz:

"Subject to the credits above recited, to be satisfied upon the payment of said balance of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3,184.39)."

Plaintiffs strike out figure "2" from the second paragraph of petition and claim in one cause of action damages for all of the wrongs and defaults committed by defendant against plaintiff- set out in their pleadings in this action.

31 Plaintiffs withdraw from the original petition their allegations in the following words, viz: "And by reason of said violation of said contract and delay and loss of time said plaintiffs have been greatly damaged, to wit, in the sum of five hundred dollars ($500.00);" and strike out of petition the words "Wherefore plaintiffs pray judgment against said Bullitt county for said further sum of five hundred dollars ($500) and for their costs, &c."

Plaintiffs state that the defendant, notwithstanding said proceedings and its agreement in said contract, has wrongfully and in violation of its said agreement and undertaking failed and refused to perform its said contract and to pay plaintiff- for the work done thereunder, by reason whereof plaintiffs have been greatly damaged,

to wit, in the sum of five thousand three hundred and twenty — dollars and fourteen cents ($5,325.14).

32 Wherefore plaintiffs pray judgment against the defendant for five thousand three hundred and twenty-five dollars and fourteen cents ($5,325.14) and for their costs, &c.

HARLAN & WILLSON,
Att'ys for Pl'ffs.

Augustus E. Willson on oath says that he is one of the attorneys for W. T. Washer, Jacob Danenhauer, and Peter Baecker, plaintiffs in the foregoing amended petition; that they are all of them absent from the district and State of Kentucky, and that he believes that the statements of the foregoing amended petition are true.

AUGUSTUS E. WILLSON.

Subscribed and sworn to before me by Augustus E. Willson this 24th day of March, 1880.

CLARENCE E. WALKER,
Notary Public, Jefferson Co., Ky.

Order. De'm'r to Am'd Pet. Filed.

And afterwards, to wit, on the 19th day of April, 1880, came the defendant and filed its demurrer to the amended petition
33 herein; which demurrer is as follows:

Demurrer to Amended Petition.

In the United States Circuit Court for the 6th Circuit & Kentucky District.

W. T. WASHER & Others, Plaintiffs,

vs.

BULLITT COUNTY, Defendant.

Demurrer.

The defendant, Bullitt County, demurs to the amended petition filed March 24th, 1880, and for grounds of demurrer says:

First. That the said amended petition does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore it prays judg't, &c.

F. P. STRAUS,
County Attorney.
JAMES SPEED &
RODMAN & BROWN,
Att'ys for Def't.

Order. Dem'r Sust'd & Judg't for Def't, Cost, & Appeal Prayed & Granted.

And afterwards, at another term of our said court, to wit, on the 9th day of October, 1880, the court being now fully advised
34 of the demurrer to the amended petition, it seems to the court the law is for the defendant. It is therefore considered by the court that said demurrer be, and the same is hereby, sustained, and the plaintiffs saying nothing further, it is considered by the court that the plaintiffs take nothing by their petition, and that the defendant go hence without day and recover of the plaintiffs its costs herein expended.

And thereupon the plaintiffs pray an appeal to the Supreme Court of the United States, which is granted.

Opinion of Court.

The opinion of the court in deciding the demurrer is as follows:

Circuit Court of the United States for the District of Kentucky.

WILLIAM T. WASHER *et al. vs.* BULLITT COUNTY.

I see no reason to change the views intimated upon the argument. While county courts have a general authority, under
35 chap. 28, art. V, sec. 1, to erect bridges, I think the provisions of ch. 94, art. 1, sec's 36 and 37, must be pursued when it is proposed to carry the bridge into another county. By sec. 37 the circuit court of Jefferson county might not only have compelled the appointment of a commissioner, but "the erection of such bridge," if it were deemed advisable. But of what use would it be to authorize one county to build a bridge into another if that other refused to open a road to connect with it?

Bullitt Co. could not bind Jefferson to pay its proportionate share, and the county court of Bullitt could not levy more than its share from its tithables. The attempt to guarantee the payment of Jefferson's share was clearly unauthorized.

The case is practically controlled by that of the Nelson Co. C't *vs.* Washington Co. C't, 14 B. Mon., 92.

36 *Mandate, &c., Filed.*

And afterwards, at another term of our said court, to wit, on the 20th day of May, 1884, came plaintiffs, by A. E. Willson, attorney, and defendant, by D. M. Rodman, attorney; and plaintiffs, by their said counsel, filed the mandate of the Supreme Court of the United States and taxation of plaintiffs' costs in the Supreme Court of the United States, which are in the following words:

Mandate.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Kentucky, Greeting:

Whereas lately, in the circuit court for the district of Kentucky, before you or some of you, in a cause between W. T. Washer, Jacob Danenhauer, and Peter Baecker, plaintiffs, and Bullitt County, defendant, wherein the judgment of the said circuit court entered in said cause is — the following words, viz:

"And afterwards, at another term of our said court, to wit, on the 9th day of October, 1880, the court being now fully advised
37 of the demurrer to the amended petition, it seems to the court the law is for the defendant. It is therefore considered by the court that said demurrer be, and the same is hereby, sustained.

And, the plaintiffs saying nothing further, it is considered by the court that the plaintiffs take nothing by their petition, and that the defendant go hence without day and recover of the plaintiffs its costs herein expended," as by the inspection of the transcript of record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this Court that the judg-
38 ment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said plaintiffs recover against the said defendant, Bullitt County, eighty dollars and ninety-seven cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings to be had therein, in conformity with the opinion of this Court, 3rd March, 1884.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-four.

39 Costs of plaintiffs:

Clerk	$34 87
Printing record	26 10
Attorney	20 00
	$80 97

Taxed by—

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Order. Judg't Set Aside. Dem'r to Am'd Pet. Over'l'd & Judg't for Pl'fjs' Costs on Dem'r & Costs of Supreme Court.

And thereupon, on motion of plaintiffs, by their said attorney-, and in accordance with said mandate and judgment of the Supreme Court of the United States, it is now ordered and adjudged by this court — reversed by the Supreme Court, as shown by said mandate, be, and are hereby, set aside; that the demurrer of the defendant to the amended petition of plaintiffs be and is overruled, and that plaintiffs recover of defendant, Bullitt County, their costs upon said demurrer expended, and may have execution; and that plaintiffs recover of defendant, Bullitt County, eighty dollars and ninety-seven cents, their costs in the Supreme Court of the United States, and may have execution therefor; and, on motion of defendant,
40 by counsel, the court grants defendant ninety days in which to prepare and file its answer in this action.

Answer & Ex'b't Filed.

And afterwards, at a term of our said court held for its October term, 1884, to wit, on the 21st day of October, 1884, came the defendant, by D. M. Rodman, its attorney, and filed its answer and exhibit herein.

Reply to Ans'r Filed.

Came also the plaintiff-, by A. E. Willson, *his* attorney, and filed *his* reply herein.

The answer of defendant above referred to and filed is as follows, to wit:

Answer of Def't.

In the United States Circuit Court for the Sixth Circuit, Kentucky District.

W. T. WASHER, JACOB DANENHAUER, and PETER BAECKER, Plaintiffs,
vs.
BULLITT COUNTY, Defendant.

Answer & counter-claim.

The defendant, Bullitt County, for answer to the plaintiffs' peti-

tion, denies that on the 8th day of July, 1878, this defendant
41 made and entered into, executed, and delivered a contract in writing of that date to build a bridge across Pond creek between Bullitt and Jefferson counties, according to plans set out in the alleged contract filed with the petition, marked Exhibit "A."

This defendant denies that it has or ever had a copy of the contract alleged to have been made with plaintiffs, in which the plaintiffs Danenhauer and Baecker were sureties.

It denies that the copy of the contract filed by plaintiffs is the one given by this defendant county to said Washer. It denies that said contract was duly executed and agreed upon by all the parties thereto. It denies that it has now in its possession, or that it ever had, said alleged contract or any copy of it in its possession, and says it cannot produce the same herein.

This defendant denies that the plaintiff, W. T. Washer, relying upon the supposed contract, at the special instance and re-
42 quest of the defendant or the Bullitt county court, entered upon the work of building a bridge across Pond creek, or that he purchased and removed to and near said bridge stone and other material, horses, carts, and tools, and employed men, and proceeded to the construction of said bridge, except under the circumstances and to the extent hereinafter admitted. It denies that under the supposed contract sued on plaintiff, W. T. Washer, performed labor and rendered services, expended money, and furnished materials amounting to the sum of five thousand three hundred and twenty-five and $\frac{14}{100}$ dollars ($5,325.14) or any sum.

This defendant denies that it ever received and accepted said work or any part of it. It denies that it authorized and empowered J. W. Ridgeway to examine and approve said work. It denies that he did examine and approve it.

This defendant denies that by the contract sued on there
43 was due the plaintiffs or any of them the sum of $5,325.14.

This defendant denies that it notified the plaintiff Washer to stop said work of erecting said bridge. It denies that said Washer quit work on said bridge because of any notice from this defendant.

It denies that it compelled said Washer to stop said work or that it prevented the plaintiff- from putting up said bridge.

This defendant denies that the owners and occupants in possession of the land approaching said bridge on both sides of Pond creek appeared in open county court and relinquished of record the right of way to and across said bridge. It denies that it had at any time the right of way for a public road across said bridge, and that it so owned it at the time the alleged contract sued on was made. It denies that it decided to erect said bridge except in conjunction with Jefferson county and as hereinafter admitted.

This defendant denies that thereafter said Commissioner
44 Ridgeway reported plans and specifications for erecting said bridge or that he reported bids that were offered. It denies that he reported the bid of plaintiff Washer, and that thereupon W. Carpenter, the county judge named in said order, received the

bid so reported and accepted the bid of said Washer. It denies that any such bid was ever excepted.

This defendant denies that the said Ridgeway, as commissioner for the defendant, executed and delivered the contract sued on. It denies that the county judge and a majority of the justices of this defendant's county court knew that said Washer was doing said work under said alleged contract sued on. It denies that the tenor and terms thereof were well known to said judge and justices. It denies that, with a full knowledge of the work and services set forth in plaintiffs' petition, it recognized and ratified said alleged contract by the orders referred to in the amended petition, but it says that said orders were made under the circumstance hereinafter
45 shown. This defendant denies that it has wrongfully and in violation of the alleged agreement failed and refused to perform its contract to pay plaintiffs for work done thereunder. It denies that, by reason of any violation of any contract made by this defendant, the plaintiffs have been greatly damaged in the sum of $5,325.14 or any sum whatever.

Par. 2. Further answering, this defendant says that it is a corporation, being one of the counties of the State of Kentucky created and formed by an act of the General Assembly of the State of Kentucky, approved December 13th, 1796, with no power to make contracts and bind the people therein, except by its county court, which is a court of record, composed of a presiding judge and the justices of the peace of the county, of whom it requires a majority to act; that the James Ridgeway mentioned in plaintiffs' amended petition as the commissioner of this defendant was appointed on the 21st day of May, 1877, by the presiding judge of this defend-
46 ant county, none of the justices being present, a commissioner to view routes across Pond creek and a site for a bridge to be erected between Bullitt and Jefferson counties, and to confer with a commissioner to be appointed from Jefferson county, and in said order he was directed to report to court; that said Ridgeway did, on the 17th day of June, 1877, report in favor of what will be hereinafter called "the Brawner site," saying in his report that a bridge there would cost twenty-five hundred dollars; that afterwards, on the 18th day of February, 1878, Thomas J. Ramsey and James Horine were by the presiding judge of the Bullitt county court, none of the justices sitting, appointed on the commission with said Ridgeway to confer with the Jefferson county commissioner to view routes and a site for a bridge and to report to court; that, on the 20th day of May, 1878, two of said commissioners, James Ridgeway and James Horine, made their report to court, in which they reported in favor of the Brawner site, and
47 say that it would cost $2,500.00 to build a bridge there; that a form of a proposed contract contemplating and providing for the joint co-operation of Bullitt and Jefferson counties was prepared and sent to James Ridgeway, which was to be signed by the plaintiff Washer and the commissioners of both counties and then to be reported back to the Bullitt county court, but the said Ridgeway, without any power or authority whatever, made and

entered into the alleged contract or agreement, Exhibit "A," which he never reported to this defendant's county court and which this defendant county never recognized, ratified, or approved of in any way, and the judge and justices of the Bullitt county court never knew of the contents of said paper as to the alleged guarantee until after the commencement of this suit; and this defendant therefore says that the alleged contract is not its act and deed.

48 This defendant files herewith as part hereof a complete copy of the record of all its orders and papers of record concerning the said Pond creek bridge, and makes the same a part hereof, marked "Axy."

Par. 3. Further answering, this defendant says that when it was deemed advisable to build a bridge across Pond creek this defendant, in order to have the money on hand, allowed the sum of six hundred dollars, so that it could be collected in the coming year, as a tax had to be levied and collected for that purpose, and the six hundred dollars referred to in the orders and in the amended petition was not levied to be paid on any contract then made, but simply to have money on hand when a site should be selected and a contract made; that when said six hundred dollars was collected it was by the sheriff without authority paid over to the plaintiff Washer, who received the same in part

49 compensation for work done by him on the Pond creek bridge; that the plaintiff Washer, after having procured the consent of said commissioner, Ridgeway, to the alleged contract sued upon, was willing and ready to undertake said work without knowing that Jefferson county would unite in the contract, which risk he was willing to take, proceeded and did some work on said bridge, and contracted for and had delivered on the bank of the creek an iron bridge, which plaintiffs had purchased from the Smith Bridge Company, but did not complete said bridge; that on or about the 18th day of November, 1878, *which* said work was in the said incomplete condition and this defendant's county court being ignorant of the fact that there was any provision in any contract that it was to guarantee Jefferson county's part of the cost, the plaintiffs Washer, Baecker, and Danenhauer represented to this defendant's

50 county court that they had performed a large amount of work and furnished a large amount of material, in excess of three thousand dollars; that they had not then obtained any concurrence from or appropriation from Jefferson county, but expected to do so; that there was then (November 18th, 1878) nothing due from this county to said plaintiffs, but plaintiffs proposed to this defendant's county court that if the said county court would appropriate and make a levy for and pay them the sum of twelve hundred dollars in addition to the six hundred dollars already paid they, plaintiffs, would accept and receive the same in full discharge and payment by this defendant for all work done and material furnished, for all alleged damages done by the alleged violation of contract, and for all demands whatever growing out of the building of said bridge; that plaintiffs would go on and complete said bridge and look to

Jefferson county and to it alone for any further pay or
51 compensation; that this defendant's county court accepted said proposition, made the said appropriation and levy, and the said sum of twelve hundred dollars was appropriated, levy made therefor, collected, and paid over to plaintiffs, who received and accepted the same in full discharge and satisfaction of all demands from this defendant growing out of the alleged contract and the building of said bridge, and this defendant pleads and relies upon the said payment as a full accord, satisfaction, settlement, and payment of plaintiffs' demand sued upon.

Further answering, this defendant says that the sum of eighteen hundred dollars was paid to the plaintiffs upon their representations that they had done some work upon said bridge and furnished materials in excess in value of three thousand dollars; that they were proceeding to and would proceed to complete said bridge and
52 look to Jefferson county for all the cost thereof in excess of eighteen hundred dollars; that they further represented, when they received said twelve hundred dollars, that the work they had done on said bridge was done in a skillful and workmanlike manner; that the masonry was of good material and good for the purpose intended.

Now, this defendant says that said representations were false in this: That said work had not been done in a skillful and workmanlike manner; that the masonry was not of good material, but was soft and crumbles by the action of the weather and is falling down, and said stone abutments are worthless and of no value to this county; that the bridge was not and has never been completed; that the iron bridge bought of the Smith Bridge Company has never been taken away and sold by plaintiffs; that said twelve hundred dollars was paid without notice of said defects,
53 and by reason of the premises the same was without any value or consideration to this defendant, and the plaintiffs are, by reason of the premises, not only not entitled to recover anything further by reason of the work done on said bridge, but this defendant is, by reason of said premises, entitled to recover from the plaintiffs the said sum of eighteen hundred dollars, for which it makes this answer a counter-claim against the plaintiff Washer for the sum of six hundred dollars and against the plaintiffs Baecker and Danenhauer for the sum of twelve hundred dollars.

The defendant says that by reason of the defective and worthless character the work done upon said bridge and the material used therein the *defendant* Washer is not entitled to recover anything therefor.

Par. 4. Further answering, this defendant says that one J.
54 H. Shelley and one H. J. Trabue claim to have an interest in the money sought to be recovered in this action; and while this defendant denies that it is indebted to plaintiffs in any sum whatever, it says that said Shelly and Trabue, who claim to be partners as Shelly & Trabue, are necessary parties to this action, because said Shelly & Trabue, on the 21st day of October, 1878, commenced an action, No. 33333, in the Louisville chancery court,

against W. T. Washer and the other plaintiffs, in which they sought to recover of said Washer the sum of $292.76, with interest from the 25th day of December, 1876, and his costs in said action; that in said action said Shelly and Trabue sued out an attachment and caused the same to be levied upon this defendant, and by virtue of said attachment said Shelly & Trabue claim a lien upon the sum alleged to be due by this defendant to the amount of the debt, interest, and costs due by said Washer to said Shelly & Trabue in said action, No. 33333, which is still pending and undetermined,
55 and this defendant is entitled to have its interests protected against the alleged lien of said attachment.

Wherefore this defendant prays that the plaintiffs' petition be dismissed; that this defendant recover of the plaintiff, W. T. Washer, the sum of $600.00, and of the plaintiffs, Jacob Danenhauer and Peter Baecker, the sum of $1,200.00, with interest on both of said sums; that the plaintiffs be ordered to make Shelly & Trabue parties to this action, and for all proper relief.

JAS. SPEEDY, RODMAN & BROWN,
CHAS. CARROLL & STRAUS,
Attorneys for Defendant.

UNITED STATES OF AMERICA, *District of Kentucky:*

James F. Smith says that he is the presiding judge of the Bullitt county court, and that the statements contained in the foregoing answer are true, as he believes.

J. F. SMITH.

Subscribed and sworn to by W. Carpenter before me this 20th day of September, 1884.

D. M. RODMAN, *N. P., J. C.*

56 The exhibit referred to and filed with the foregoing answer of defendant is as follows, to wit:

Exhibit Filed with Answer of Def't.

STATE OF KENTUCKY:

Bullitt County Court. May Term, 1877.

Be it remembered that at the regular May term of the Bullitt county court, held at the court-house, in Shepherdsville, on Monday, the 21st day of May, 1877.

Present: Honorable W. Carpenter, judge.

"It is ordered that James W. Ridgway be, and he is hereby, appointed a commissioner for the purpose of viewing Pond creek and selecting a site for the erection of a bridge across said creek, and he is directed to meet and confer with the commissioner appointed by the Jefferson county court for the same purpose, and they will view the site pro-

posed at Steel's ford, and may view other cites, and report in
57 favor of that which will be the least expensive, hav- due regard to the convenience of the traveling public, and they will make report to court.

"It is ordered that James Caswell, A. F. Brooks, James M. Carpenter, R. Munsford, John N. Crenshaw, C. C. Weller, Thos. J. Hall, and W. H. Ellaby, justices of the peace of Bullitt county, attend the next June term of the Bullitt county court and officiate with the judge thereof in relation to the building of a bridge across Pond creek."

Again in court, June 18th, 1877.

Pond creek bridge matter.

Present: Honorable W. Carpenter, judge; Thos. J. Hall, W. H. Ellaby, J. H. Crenshaw, C. C. Weller, James M. Carpenter, R. Munsford, A. F. Brooks, and James Caswell, justices.

This day came J. W. Ridgway, commissioner herein, and
58 filed his report, which report is confirmed as to the necessity of erecting the bridge, and the Brawner foundation site, where the abutments are now situated, is adopted as the cheapest and most available site for erecting said bridge. It is further ordered that James W. Ridgway be, and he is hereby, appointed a commissioner to confer with a like commissioner, to be appointed by the Jefferson county court, upon plans and specifications for said bridge and the probable costs of same. They are authorized to ascertain by any means they may see proper the least amount that will erect said bridge and make report to this court at the next term thereof.

The report referred to in above order is in the following words and figures, to wit:

Report.

To the Bullitt county court:

In the matter of the building a bridge and location of the site for same over Pond creek, as commissioner of said court I beg
59 leave to report as follows: That I have met and conferred with the commissioners of Jefferson county, who have declined to take any action until after the action in said matter of the Bullitt levy court.

I examined the present site of the county road in the line between Steele & Applegate and the site on the Brawner foundation, where stone foundations have been made; also another site over the land of S. — Applegate and known as the Randall Smith line. I find that at the present site of the road *and* bridge will require (60) sixty feet span, twenty-five feet in height; that on the Brawner foundation it will require a (25) twenty-five-feet span, where there are now substantial stone abutments & wings built up level or above the surface; that at the site over Applegate's (Randall Smith's line) it will require a (50) fifty-feet span, the height at each place equal.

I am of opinion it will cost $6,000.00 to build a stone abut-
60 ment bridge at the present site of the old bridge, on line of Steele and Applegate; that as good bridge can be built on

this old Brawner foundation for $2,500.00 to use the stone now quarried; that it will cost $5,500.00 to build a bridge on the Randall Smith line. I think the old Brawner foundation the cheapest place to build a bridge, with due regard to the interests of the traveling public. This line diverges from the present site of the county road near the bank of Pond creek, runs down the creek bank in a westerly direction about 275 yards from the site of the road at this time to the bank of the creek at the Brawner abutments on high ground, and on a straight parallel line with the road now to the public road on the Ohio river, a distance of about six hundred yards, and directly leading to the present location of the R. R. station. By this route it will be about 200 yards further to Louisville than the present road. It leads direct to the station, and a great deal of
61 travel only goes to the station. The right of way on this route is offered by A. P. Steele, over whose premises it passes, free, except the cost of additional fencing. This change would not inconvenience the traveling public materially and do very little injury to any individuals. The new route over Applegate's, on the Smith line, diverges from the county road at Isaac Ferguson's, running around the foot of hill 375 yards to the Smith line on Applegate with said line nearly parallel with present road to the turnpike the distance of a mile from Ferguson's. It strikes the turnpike about 400 or 500 yards from the R. R. station above it.

To change the road to this Applegate route on Randall Smith's line would result very injuriously to A. P. Steele & several others living below him and owning land in this county.

If the money can be had I would prefer the present old route & site for the bridge over all others, & recommend no change
62 if we can get a bridge where the road at present exists.

Respectfully, J. W. RIDGWAY, *Com'r.*

By leave of court I amend my original report herein and would state that the traveling public requires a new bridge across Pond on the — road, the old bridge being in a very unsafe condition and dangerous to the traveling public.

J. W. RIDGWAY.

Again in court, July 16th, 1877.

Pond creek bridge.

Present: Hon. W. Carpenter, judge; W. H. Ellaby, John N. Crenshaw, C. C. Weller, James M. Carpenter, R. Munsford, and James Caswell, justices.

It is ordered that six hundred dollars be appropriated, to be paid out of the county levy of Bullitt county, for the purpose of erecting a bridge across Pond creek at the Brawner foundation site, to be levied at the November court of claims, 1877, and J. W. Ridg-
63 way, the commissioner herein, is directed to report plans & specifications for erecting said bridge, and also to report any bids that may be offered, and the amount of each bids, if any are made.

W. Carpenter, county judge, is authorized to receive bids and accept or reject same as he may think proper, looking to the interest of Bullitt and Jefferson counties in the matter.

This day A. P. Steele appeared in open court and relinquished the right of way over his land for the public road running to the bridge proposed to built across Pond creek at the Brawner foundation site.

In court, August 20th, 1877.

Pond creek bridge matter.

It is ordered that this cause be continued until next term of this court.

In court, September 17th, 1877.

Pond creek bridge matter.

It is ordered that this cause be continued until next court.

Again in court, October 15th, 1877.

64 Pond creek bridge matter.

It is ordered that this cause be continued.

Again in court, November 19th, 1877.

Pond creek bridge matter.

It is ordered that James W. Ridgway be appointed commissioner on behalf of Bullitt county to contract for the building of a bridge across said creek at the place heretofore selected as a site, and he will report to court on the matter.

Again in court, November 19th, 1877.

Present: Hon. W. Carpenter, judge; W. H. Ellaby, J. N. Crenshaw, C. C. Weller, R. Munsford, James M. Carpenter, A. F. Brooks, and James Caswell, justices of the peace.

Six hundred dollars is allowed to be appropriated to the building of a bridge across Pond creek. $600.

In court, December 17th, 1877.

Pond creek bridge matter.

It is ordered that this cause be continued.

65 Again in court, January 21st, 1878.

Pond creek bridge matter.

It is ordered that the county surveyor, Casper Herps, meet with J. W. Ridgway, the commissioner heretofore appointed in this matter, and locate and survey the site for the erection of a bridge across Pond creek at the Brawner foundation site, and report to court.

In court, February 18th, 1878.

Pond creek bridge matter.

In addition to the commissioner, J. W. Ridgway, heretofore appointed by this court on behalf of Bullitt county, it is ordered that Thomas J. Ramsey and James Horine be also appointed on behalf of Bullitt county to meet and confer with the commissioners appointed by the Jefferson county court in selecting a site to build a bridge across said creek and to assist in any matter that may come before said commissioners.

Again in court, April 15th, 1878.

66 Pond creek bridge matter.

It is ordered that this cause be continued.

In court, May 20th, 1878.

Pond creek bridge matter.

This day came the commissioners appointed on behalf of Bullitt county and filed their report herein, which report shows the selection of the Brawner foundation site for the erection of a bridge across said creek; and this cause is continued.

The following is the report referred to in the foregoing order, viz:

We, your commissioners appointed by the Bullitt county court for the purpose of reviewing a location for a bridge over Pond creek, it being the line of Bullitt & Jefferson counties, beg leave to make the following report, namely:

After notifying the commissioners appointed by the Jefferson county court to meet us, which they failed to do, we proceeded
67 to examine three different places or locations—that is to say:

1st. One on the premises of Stacy Applegate; and, after taking in consideration the length and height of fills, the length of span, it being not less than fifty feet, with height of abutments and length of wings of rock, with good, substantial structure of wood or iron, would cost six thousand five hundred dollars.

2nd. The location where the old bridge now stands and on the present county road, and after taking in consideration distance of fills with stone abutments, wings of proper length, width of span, it being not less than sixty feet, would cost six thousand five hundred dollars.

3rd. The lower or Brawner abutments route.

After taking the height and breadth and length of fills we are of opinion that a stone-arch bridge can be built by using the
68 rock already quarried for twenty-five hundred dollars, and should it be necessary to quarry other rock it would cost three thousand dollars; and, after thorough examination of the three different routes, we are of opinion that the lower or Brawner

route is the best and as equal, if not better, as it leads direct to the depot grounds and to a public landing on the Ohio river.

March 14th, 1878.

J. W. RIDGWAY.
JAMES HORINE.

Again in court, June 17th, 1878.

Pond creek bridge matter.

This day came Casper Herps, surveyor of Bullitt county, and filed his report herein, and this cause is continued.

The report referred to in the foregoing order is not in papers and can't be found.

Again in court, July 15th, 1878.

Pond creek bridge matter.

It is ordered that this cause be continued.

In court, August 19th, 1878.

69 Pond creek bridge matter.

It is ordered that this cause be continued.

In court, September 16th, 1878.

Pond creek bridge matter.

It is ordered that this cause be continued.

Again in court, October 25th, 1878.

Pond creek bridge matter.

It is ordered that F. P. Straus, county attorney of Bullitt county, be, and he is hereby, authorized and directed to institute suit, make any motion, or take any steps necessary against the Jefferson county court to compel it to levy its proportion of the cost for the erection of the bridge across Pond creek at the Brawner foundation site, said creek being the dividing line between Bullitt and Jefferson counties.

Again in court, November 18th, 1878.

Pond creek bridge matter.

It is ordered that this cause be continued until December term.

70 Again in court, November 18th, 1878.

Present: Hon. W. Carpenter, judge; W. H. Ellaby, J. C. Dent, J. W. Crenshaw, C. C. Weller, James M. Carpenter, R. Munford, James Caswell, and A. F. Brooks, justices.

It is ordered that a tax of 5% upon each one hundred dollars' worth of taxable property of Bullitt county be levied for the pur-

pose of paying for the erection of a bridge across Pond creek, to be collected by the sheriff of Bullitt county as other revenue tax is collected, the amount of property to be ascertained from the assessor's book to be returned for the year 1879, and said tax to be collected for said year.

It is ordered that Jacob Danenhauer and Peter Backer, assignees of W. T. Washer, contractor to build a bridge across Pond creek, be allowed the sum of twelve hundred dollars ($1,200), to be paid out of the 5% *per cent.* levy this day made.

Again in court, December 16th, 1878.

71 Pond creek bridge matter.

It is ordered that this cause be continued.

Again in court, January 20th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

In court, February 17th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

In court, March 17th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

In court, April 21st, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

Again in court, May 19th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued until June term.

72 In court, June 16th, 1879.

Pond creek bridge matter, Steele route.

This cause is continued until the August term of this court.

Again in court, August 18th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

In court, September 15th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

In court, October 20th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

In court, November 17th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued.

Again in court, November 18th, 1879.

Present: Hon. W. Carpenter, judge; W. H. Ellaby, J. C. Dent, James M. Carpenter, W. M. Cundiff, A. F. Brooks, James Caswell, J. W. Crenshaw, & O. H. Bolton, justices.

73 Pond creek bridge matter, Steele route.

On motion of F. P. Straus, county att'y, C. B. Davis, J. M. Carpenter, & James Y. Pope are appointed a committee to examine the stone-work done on the Pond creek bridge and report at the January term of this court as to the kind and nature of the stone used in said work and the character of the work.

In court, December 15th, 1879.

Pond creek bridge matter, Steele route.

It is ordered that this cause be continued until the next January term of this court.

In court, January 19th, 1880.

Present: Hon. W. Carpenter, judge; J. C. Dent, W. H. Ellaby, J. N. Crenshaw, O. H. Bolton, James M. Carpenter, W. M. Cundiff, James Caswell, and A. F. Brooks, justices.

Pond creek bridge matter, Steele route.

74 This day came the committee appointed at the November term of this court, viz, C. B. Davis, Jas. M. Carpenter, and James Y. Pope, and filed their report, which was read to and confirmed by the court, and said committee is now discharged.

The report named in the foregoing order is as follows:

We, the undersigned, commissioners appointed by the Bullitt levy court, at its November term, 1879, to proceed to the Pond creek bridge and to examine the character of the stone-work done on

said bridge, the nature and kind of stone used in said work, would respectfully report that we did, on the 25th of November, 1879, proceed to the place of said bridge and made a thorough examination of said work and find the following facts:

1st. That the backing used in the west abutment should not be used in neither first nor second class stone-work. We also found several stretchers in the face wall of a quality not fit to be used in first or second class work. We found one header broken and
75 damaged by the action of the weather. We could not find that grout or sement was used in the wall, which should be used in first-class masonry; no lime or anything of that character used except in pointing. We inserted a pole three feet three inches in the front wall. We found the horizontal joints and the vertical joints two and three inches apart in several parts of the work. The wing wall of the west abutment is sprung at least ten inches; will fall in a short time. Nothing like a superstructure can be placed on said work with safety. This abutment cannot be used for any purpose.

2nd. We found the east abutment — be somewhat better than the other one, but very defective; great deal of stone should not be used in first or second class work. The backing used in said abutment is the same as that used in the other abutment. The work in this abutment, in our opinion, should not be received.

C. B. DAVIS.
JAS. M. CARPENTER.
JAMES Y. POPE.

76 STATE OF KENTUCKY, }
Bullitt County, } *sct:*

I, E. W. Hall, clerk of the Bullitt county court, in the State aforesaid, do certify that the foregoing are true copies of all the orders of the Bullitt county court made in the Pond creek bridge matter, at the Brawner foundation site, and that the various courts were held by the county judge alone, except as otherwise shown in the preceeding record, and that the foregoing are true copies of all the reports filed in said matter, except the report referred to in order of date 17th June, 1878, as being filed by Casper Herps, surveyor. Said report is not in the papers and can't be found.

Witness my hand and seal of office this the 9th day of Oct., A. D. 1884.

[L. S.]

E. W. HALL,
Clerk Bullitt County Court.

The reply of plaintiffs to answer of defendant filed herein is as follows:

Reply to Ans'r.

Circuit Court of the United States for the District of Kentucky.

77 W. T. WASHER, &c., Plaintiffs,
vs.
BULLITT COUNTY, Defendant.

Reply.

Plaintiffs, for reply to so much of the answer and counter-claim of defendant as they deem it material to reply to, state that they have no knowledge or information sufficient to form a belief as to whether the Ridgeway mentioned in said pleading on the 17th of June, 1877, and Ridgeway and Horine on the 20th of May, 1878, reported to defendant's county court that it would cost $2,500 to build a bridge at the Brawner site, or as to whether a form of a proposed contract contemplating and providing for the joint co-operation of Bullitt and Jefferson counties was prepared or sent to said Ridgeway, which was to be signed by the plaintiff Washer and the commissioner of both counties, and then to be reported back to the Bullitt county court.

Plaintiffs deny that the action of the said Ridgeway in
78 making the contract, Exhibit "A," was without power or authority, or that said contract, Exhibit " A," was never reported to defendant's county court, or that defendant never recognized, ratified, nor approved of it in any way, or that the judge or justices of the Bullitt county court never knew the contents of said paper as to the alleged guarantee until after the commencement of this suit, and denies the allegation that said contract was not its act and deed.

Plaintiffs deny that the $600 referred to in the order and amended petition was not levied to be paid on the contract sued on or was levied simply to have money on hand when a site should be selected and a contract made, or that the payment of that sum to plaintiff Washer by the sheriff was without authority; and deny that the plaintiff Washer, after having procured the consent of Commissioner Ridgeway to the contract sued on, was willing or ready to undertake said work without knowing that Jefferson county
79 would unite in the contract or willing to take that risk; and deny that defendant's county court was ignorant of the guarantee in said contract, or ignorant of the fact that there was a provision in the contract that it was to guarantee Jefferson county's part of the cost; and deny that defendant's county court, being ignorant, as alieged, of such provision, plaintiffs represented to said county court that they had performed a large amount of work and furnished a large amount of material in excess of $3,000, and had not obtained any concurrence from or appropriation from Jefferson county, but expected to do so; and deny that there was then, Nov. 18th, 1878, nothing due from defendant to plaintiffs; and deny that plaintiffs proposed to defendant county court that if it would appropriate and make a levy for and pay them the sum of $1,200 in ad-

dition to the $600 already paid plaintiffs would accept or receive the same in full discharge or payment by defendant for all work
80 done and material furnished, or for all alleged damages done by the alleged violation of the contract, or for all demands whatever growing out of the building of said bridge, or would go on and complete said bridge and look to Jefferson county and to it alone for any further pay or compensation.

Plaintiffs deny that they made any such proposition or any such agreement, or any agreement other than heretofore shown in plaintiffs' pleading, and deny that defendant's county court accepted any such proposition from plaintiffs or made the appropriation and levy alleged in consequence of or upon any such proposition, or that the same was collected or paid over to plaintiff- under or upon any such proposition; and deny that plaintiffs received or accepted the same in discharge or satisfaction of all or any demands from defendant growing out of said contract and building of said bridge, excepting in so far as the amounts paid would go in making payment
81 for the work done; and deny that the said payments were or are full accord or satisfaction or settlement or payment of plaintiffs' demand sued upon; and deny that said payments were made to plaintiffs upon the representations alleged in said pleadings or upon the representation that plaintiffs had done some work upon said bridge and furnished materials in excess of the value of $3,000, and were proceeding to and would proceed to complete said bridge and looked to Jefferson county for all or any of the cost thereon in excess of $1,800.

Plaintiffs deny that their representations that the work done on the bridge was good and workmanlike work and masonry of good material and good for the purpose intended was false, as alleged, and deny that the work had not been done in a skillful and workmanlike manner, and deny that the masonry was not of good material or soft, or crumbled by the action of the weather and is falling down; and deny
82 that said stone abutments are worthless or of no value to defendant, and deny that the iron bridge bought of the Smith Bridge Co. has been taken away or sold by plaintiffs, and deny that there were any defects in said work, and deny that it was without value or consideration to defendants, and deny that plaintiffs are not entitled to recover anything therefor by reason of the work, and deny that defendant is, by reason of the matter alleged by it, entitled to recover from plaintiffs or either of them the sum of $1,800 or any part thereof, or of the plaintiffs, Becker and Danenhauer, $1,200 or any part thereof; and deny that the work done upon the bridge or the material used therein was of defective or worthless character or that plaintiff Washer is not entitled to recover anything therefor.

For answer to the fourth paragraph, defendants admit that
83 Shelley and Trabue brought a suit and levied an attachment in the Louisville chancery court, as alleged and for the sum alleged, but they state that said attachment and suit were subsequent in time and inferior in equity to the claim of Danenhauer and Becker under the assignment filed herein, and that there will

be nothing due to said Washer out of the fund to be recovered herein and nothing subject to said attachment.

Plaintiffs will consent, however, if they recover judgement herein, that said Danenhauer and Becker shall pay the balance, if any, after repayment to them of the advances and expenses for which the assignment was made, and their expenses in recovering judgment to the said Shelley and Trabue if there be such balance.

Plaintiffs state that the interruption of said work and order for plaintiff- to quit work on said bridge mentioned in the original
84 pleadings compelled plaintiff- to stop work on the bridge, and left it incomplete and exposed to the action of the weather and to injury from the weather and from the lapse of time, which it would not have suffered if defendant had not permitted plaintiff- to finish the work and had performed defendant's part of the contract; that by reason of the interruption of work on this work and this failure to perform the contract, it has been greatly exposed to the weather and to injury, and to such action of the elements as would cause it to deteriorate and crumble, and may cause it to fall; all of which is wholly without the fault of plaintiffs, and wholly due to the fault and neglect and failure of defendants to perform its contract.

Wherefore plaintiffs pray as in the petition as amended, &c.

AUGUSTUS E. WILLSON,
Att'y for Pl'ffs.

STATE OF KENTUCKY, } ss:
Jefferson County, }

85 W. T. Washer on oath states that he is one of the plaintiffs in the above-styled action, and affiant believes the statements of the foregoing reply and said reply are true.

W. T. WASHER.

Subscribed and sworn to before me by W. T. Washer this 21st day of October, 1884.

SAM'L B. CRAIL, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Mo. to File 2d Am'd Pet.

And at another term of our said court, to wit, on the 2d day of March, 1885, came the plaintiffs, by Augustus E. Willson, their attorney, and tendered their 2nd amended petition herein and moved the court to file the same; to which the defendant objects, and the court, not being advised thereof, takes time.

Order. Mo. to File 2d Am'd Pet. Sust'd & Filed.

And on another day of said term of our said court, to wit, on Monday, March 9th, 1885—

The court, being now fully advised of the motion of the
86 plaintiffs to file their 2d amended petition herein, it is therefore considered by the court that said motion be, and the same is hereby, sustained, and said amended petition is filed.

The 2nd amended petition of plaintiffs above referred to is as follows:

Second Amended Petition.

Circuit Court of the United States, District of Kentucky, at Louisville.

W. T. WASHER & *al.*, Plaintiffs,

against

BULLITT COUNTY, Defendant.

The plaintiffs, by leave of court, further amend their petition, and state that since filing their former pleadings herein they have learned and they state that defendant's copy mentioned in petition of the contract sued on and of the written change thereof is in the custody and control of defendant's commissioner, J. W. Ridgway, who has been requested to and agreed to produce same on the
87 trial hereof, and have been exhibited to defendant's county attorney, Carroll, now counsel for defendant, during past week; that the provisions of said contract and change thereof *on* the same on both copies; that both exhibit the agreement and change thereof agreed upon and entered into between plaintiffs and defendant; that plaintiffs signed and executed defendant's said copy of the contract of July 8th, 1878, and defendant, by its commissioner, said Ridgeway, signed and executed plaintiffs' copy, Exhibit A, and the name of James Horine is also therein; that thereafter said written change of said contract was made on defendant's said copy agreed upon between plaintiff Washer and defendant through its said commissioner, Ridgway, and signed and executed by said Washer and defendant through its said commissioner, Ridgway, and was thereafter copied by said Washer with the knowledge and
88 approval of defendant, through its said commissioner, as Washer's memorandum of the change and said copy made by said Washer is the part of Exhibit A, which shows said change.

Wherefore plaintiffs pray judgment against defendant for the sum of $5,325.14, with interest from December 24th, 1878, until paid, and for the further sum of $500 and their costs, &c.

JAMES HARLAN,
AUGUSTUS E. WILLSON,
Att'ys for Pl'ffs.

W. T. Washer on oath says the statements of the above amended petition are true.

W. T. WASHER.

Subscribed and sworn to before me by W. T. Washer this 2d day of March, 1885.

SAM'L B. CRAIL, *Clerk.*

Rejoinder & Ans'r to Am'd Pet. Filed.

And on another day of said term of our said court, to wit, on Saturday, March 14th, 1885, came the defendant, by attorneys, and filed its rejoinder and answer to the amended petition herein.

89 The rejoinder of defendant above referred to is as follows, to wit:

Rejoinder.

United States Circuit Court.

W. T. WASHER, &c., Plaintiffs,
against
BULLITT COUNTY, Defendants.

The defendant, The County of Bullitt, for rejoinder to so much of the reply as needs to be replied unto, says that it denies that it caused the interruption of the work on said bridge. It denies that it ordered plaintiff to quit said work.

It denies that by or because of any fault on its part the said work has greatly or at all been injured by the weather, or that it may fall down for that reason or from that cause.

This defendant denies that it had any contract with plaintiff other than that—or compromise and settlement—set out in the answer, and this contract this defendant has complied with in every particular. Wherefore, &c.

90 STATE OF KENTUCKY, *County of Bullitt:*

James F. Smith says that he is presiding judge of the Bullitt county court, and that the statements in the foregoing rejoinder are true, as he believes.

J. F. SMITH.

Sworn to before me by J. F. Smith this 14th day of February, 1885, as witness my hand and official seal.

[SEAL.] E. W. HALL,
Clerk Bullitt County Court.

The answer of defendant to the amended petition referred to herein is as follows:

Answer to 2nd Am'd Pet.

In the United States Circuit Court.

W. T. WASHER, &c., Plaintiffs,
against
BULLITT COUNTY, Defendant.

The defendant, for answer to the 2d amended petition filed herein March 9th, 1885, denies that this defendant has any copy of the alleged contract sued on or of the alleged change therein.

91 It denies that there is any copy of said alleged contract or any change thereof in the custody and control of defendant's commissioner, J. W. Ridgeway.

It denies that said J. W. Ridgeway is defendant's commissioner.

It denies that said J. W. Ridgeway ever was defendant's commissioner, except as shown in the orders of this defendant's county court, as shown in the exhibit marked Copy Orders and Reports & filed with the answer filed October 21st, 1884.

It denies that both said alleged copies exhibit the agreement and change thereof agreed upon and entered into between plaintiff- and defendant.

It denies that this defendant had any copy of said alleged contract which was signed by plaintiff-, and it denies that plaintiff- signed and executed this defendant's copy of said alleged contract of July 8th, 1878.

It denies that this defendant, by its commissioner, said
92 Ridgeway, signed and executed plaintiffs' copy Exhibit A.

This defendant denies that said J. W. Ridgeway had any authority whatever to make said alleged contract or to make any change thereof.

It has no knowledge or information sufficient to form a belief as to whether the plaintiff Washer copied said alleged memorandum with the approval of said J. W. Ridgeway.

It denies that said J. W. Ridgeway had any authority to bind or that he attempted to bind this defendant to any alleged change in said alleged contract.

It denies that any change was made on any copy of the defendant's alleged contract.

JAMES SPEED,
T. P. STRAUS,
CHARLES CARROLL, &
RODMAN & BROWN,
Att'ys for Defendant.

James F. Smith says that he is the presiding judge of the
93 Bullitt county court, and that the statements in the foregoing reply are true, as he believes.

J. F. SMITH.

Sworn to before — by J. F. Smith this 14th day of March, 1885.
Sworn to before me by J. F. Smith this 14th day of March, 1885.
SAM'L B. CRAIL,
U. S. Com'r.

Order & Jury.

And on another day of said term of our said court, to wit, on the 16th day of March, 1885, came the plaintiffs, by James Harlan and A. E. Willson, their attorneys; came also the defendant, Bullitt County, by James Speed and Rodman & Brown, its attorneys.

Thereupon came a jury, to wit, George Irving, C. F. Bennett, C. P. Robinson, J. S. Berryman, J. G. Caldwell, L. A. Freeman, W. H.

Nicholas, R. Hatcher, A. D. Webb, John Hall, J. H. Collins, & W. F. Goggin, who were elected, tried, and sworn to well and truly try the issue joined.

The evidence was heard in part, and there not being time to conclude same to-day time is given until to-morrow.

The jury is adjourned until to-morrow morning at 9½ o'clock.

Evidence Heard, &c.

94 And on another day of said term of our said court, to wit, on the 17th day of March, 1885, came the parties, by their attorneys; came also the jury empanneled and sworn herein. The evidence was further heard, and there not being time to conclude same to-day time is given until to-morrow.

The jury is adjourned until to-morrow morning at 10 o'clock.

And on another day of said term of our said court, to wit, on the 18th day of March, 1885, came again the parties, by their attorneys; came also the jury empanneled and sworn herein. The evidence was further heard, and there not being time to conclude same to-day time is given until to-morrow morning at 9½ o'clock.

Order.

95 And on another day of said term of our said court, to wit, on the 19th day of March, 1885, came again the parties, by their attorneys; came also the jury empanneled and sworn herein. The evidence and argument of counsel were concluded, and, the court having delivered its instructions, the jury retired to consider of their verdict and returned into court the following verdict, to wit:

Judg't.

"We of the jury find for plaintiff- in the sum of thirty-one hundred and eighty-four & $\frac{39}{100}$ dollars, with interest thereon at six per cent. per annum from January 1st, 1879.

JAS. G. CALDWELL, *Foreman.*"

It is therefore considered by the court that the plaintiffs, W. T. Washer, Jacob Danenhauer, and Peter Baecker, recover of the defendant, Bullitt County, the sum of four thousand three hundred and seventy-two & $\frac{13}{100}$ dollars, the sum so assessed by the jury in their verdict aforesaid, with interest thereon at the rate of six per cent. per annum from the 19th day of March, 1885, until paid; also their costs herein expended.

Order. Mo. for N. T. Gro. Filed.

96 And on another day of said term of our said court, to wit, on the 20th day of March, 1885, came the defendant, by D. M. Rodman, its attorney, and moved the court to set aside the verdict of the jury and the judgment herein and grant it a new trial

upon written grounds. It is ordered that said motion be set for hearing on the 24th instant.

The grounds for new trial above referred to are as follows, to wit:

Grounds for New Trial.

In the United States Circuit Court.

W. T. WASHER, &c., Plaintiffs,
against
BULLITT COUNTY, Defendant.

The defendant, The County of Bullitt, moves the court to set aside the verdict and judgment herein and grant it a new trial, and for grounds says—

First. That the verdict was not sustained by sufficient evidence, but was against the evidence.

Second. The verdict and judgment are contrary to law.

Third. The court erred in matter of law, occurring at the trial, in admitting evidence, to which defendant excepted at the
97 time—that is to say, all the evidence the jury was allowed to consider concerning the alleged copy of the alleged contract sued on & the alleged original contract claimed to have been executed by J. W. Ridgeway & James Horine, to the effect that said J. W. Ridgeway, as com'r, made said contract by direction of W. Carpenter, county judge.

All the evidence to the effect that said J. W. Ridgeway, by direction of W. Carpenter, county judge, accepted the bid of plaintiff, W. T. Washer.

All evidence to the effect that said Ridgeway was directed or ordered by the said W. Carpenter, county judge, to contract with plaintiff Washer to *to* bind Bullitt county to pay for the cost of the whole work on said Pond creek bridge, or to guarantee Jefferson county's proportion of the same, or that said Ridgeway did make such a contract.

All evidence whatever that was allowed to go to the jury
98 concerning the paper signed by J. W. Ridgeway & James Horine and the paper itself.

All evidence concerning the paper signed W. T. Washer, Peter Baecher, and Jacob Danenhauer, & the paper itself.

All evidence concerning the notice or letter of W. Carpenter to J. W. Ridgeway concerning the stopping of work on said Pond creek bridge.

All evidence concerning the notice to W. T. Washer, dated Dec. 10, 1878, & signed by W. Carpenter, P. J., B. C., & T. P. Straus, C. A., B. C., or any notice to said Washer to stop said work on said bridge.

All evidence as to any contract not authorized by the defendant's court of claims & not reported to said court and approved or ratified by it of record.

Fourth. The court erred in its charge & instructions to the jury in the following particulars, to wit:

All that part of the charge that comments on & recites to
99 the jury the order of the court of claims of 16th July, 1877.

To all that part that relates to the authority of W. Carpenter, county judge, to delegate power to said J. W. Ridgeway, and which is in these words, to wit:

"It is not necessary that he should have read the bid, but if he knew what the bid of Washer was, and, substantially knowing it, accepted it, then he had the authority, after having accepted it, to delegate to Ridgeway the authority to make a contract in pursuance of that bid thus accepted. You will observe in this connection that he must have accepted the bid and he must have authorized a contract to have been made pursuant to it, and the authority must have been to bind Bullitt county. If you find, therefore, that the bid was accepted by him and that a contract was to be made in pursuance of the acceptance of the bid, then this contract thus
100 made by Ridgeway, as originally made, was binding upon the county, the defendant here."

Now, in regard to the change of the contract, it is necessary that the change of the contract should also have been known by Carpenter and accepted by him, assented to be him. He was, in that view of the case, the county, having authority to accept or reject bids. If that be the case, then the county is liable, under its contract thus changed, and it is a binding and valid contract between plaintiff- and defendant.

Also in the following parts of said charge and instructions, to wit:

"Ridgeway had not the agency, however, which bound the county in the acceptance of the work. He was authorized to contract for the work, and it may be that he had a general authority from the county judge to look after the work."

Fifth. The court *court* erred in the following part of the
101 charge and instructions to the jury, to wit: That order to quit justified Washer in quitting temporarily. Originally he was bound to go on and complete the job, and nobody could stop him but the person representing the county; but the county did stop him, and he had the right to stop temporarily, and if he did not choose to go on against his right of action — accrued when he stopped, if right of action he had.

Sixth. The verdict and judgment were erroneous in the amount of recovery, it being too large, and should not have been for more than Bullitt county's proportion of the cost of the said bridge in controversy.

Seventh. The court erred in matter of law in excluding evidence offered by defendant, particularly the complete record of the orders of the Bullitt county court concerning the Pond creek bridge matter, & in the other evidence offered by def't & excluded
102 from the jury; wherefore def't prays that the said verdict & judg't be set aside & a new trial granted.

Respectfully,

JAS. SPEED & CHARLES CARROLL &
RODMAN & BROWN, *for Defendant.*

Additional Gro. N. Trial Filed. Credit on Judg't Ent'd. Mo. for N. T. Ov'r'l'd & Time to File Bill Exc'p's.

And on another day of said term of our said court, to wit, on Tuesday, March 24th, 1885, came the plaintiffs, by Harlan & Willson, their attorneys; came also the defendant, by Rodman & Brown, its attorneys. The defendant, by its attorneys, filed additional grounds for a new trial herein. The plaintiffs, W. T. Washer, Jacob Danenhauer, and Peter Baecker, by Harlan & Willson, attorneys, in obedience to the order of the court requiring them so to do, remit from the verdict and judgment herein the interest on $3,184.39 from January 1st, 1879, to January 1st, 1880, one year's interest on the balance found for plaintiff-, which credits the judgment entered by the sum of $191.06, reducing said judgment to the sum of four thousand one hundred and eighty dollars and seven cents
103 ($4,180.07), with interest at six per cent. per annum from March 19th, 1885, together with plaintiffs' costs herein expended, to be taxed by the clerk; and thereupon, this action having been duly heard, upon the motion of the defendant for a new trial, and the court being sufficiently advised, it is ordered and adjudged by the court that said motion for a new trial be, and is hereby, overruled.

It is ordered that the defendant do have one week from date within which to prepare bill of exceptions.

The additional grounds for new trial above referred to are as follows, to wit:

Additional Gro. N. Trial.

United States Circuit Court.

W. T. WASHER *vs.* BULLITT Co.

The defendant, Bullitt County, comes & files additional grounds for new trial, to wit:

Eighth. The verdict of the jury was for too much interest, being for one year too much.

104 Ninth. The court erred in charging the jury that if they found for plaintiff they should give interest.

RODMAN & BROWN & SPEED, *For Def't.*

Bill of Exceptions Filed.

And on another day of said term of our said court, to wit, on Tuesday, the 5th day of May, 1885, came the defendant, by D. M. Rodman, its attorney, and tendered its bill of exceptions herein, which is signed and sealed by the court and ordered to be recorded, and which is as follows:

Bill of Except's.

Circuit Court of the United States, District of Kentucky.

W. T. WASHER *et al. vs.* BULLITT COUNTY.

Bill.

Be it remembered that on the trial of this action, before the Hon. John W. Barr, judge, and a jury duly empannelled and sworn in the action on the 16th day of March, 1885, the plaintiffs read in evidence from the transcript of record of the proceedings of the Bullitt county and levy court, filed as
105 an exhibit with defendant's answer herein, the orders and proceedings in said record of the following respective dates, to wit: The orders of May 21st, 1877; the orders of June 18th, 1877, with the report and amended report filed therewith; the orders and proceedings of July 16th, 1877; the two orders of November 19th, 1877; the orders of January 21st 1878; the order of February 18th, 1878; the order of May 20th, 1878, and report filed therewith; the order of June 17th, 1878; the order of October 25th, 1878; the order of November 18th, 1878. Said orders and proceedings so read to the jury are made part of this bill of exceptions and have heretofore been copied in this record on the following pages, to wit:

Order of May 21st, 1877. See page 56.
" " June 18th, 1877. " " 57.
Report of Ridgman, com'r. " " 58.
Amended report of do. " " 62.
Order of July 16th, 1877. " " 62.
" " Nov. 19th, 1877. " " 64.
" " Jan'y 21st, 1878. " " 65.
" " Feb'y 18th, 1878. " " 65.
" " May 20th, 1878. " " 66.
Report of Ridgway, com'r. See page 66.
106 Order of June 18th, 1878. " " 68.
" " Oct. 25th, 1878. " " 69.
Order of Nov'r 18th, 1878. See page 69.

The plaintiff- then offered parole evidence tending to show that in pursuance of said orders of July 16th, 1877, and November 19th, 1877, J. W. Ridgway, the commissioner named in those orders, reported to W. Carpenter, county judge, named in said orders, plans, specifications, and bids for constructing the bridge named in said orders, and the amount of each of the bids, and among others, the bid of plaintiff Washer, and that said W. Carpenter, county judge, received said plans, specifications, and bids and accepted said bid of plaintiff Washer; that said Ridgway, commissioner, by direction of said Carpenter, county judge, then executed and delivered to plaintiff Washer the contract sued on, conforming to said bid, and plaintiff signed and delivered to said Ridgway, commissioner, a copy thereof, which said Ridgway kept in his possession, and plaintiff

Washer and said commissioner Ridgway, said Ridgway act-
107 ing by direction of said Carpenter, county judge, executed and delivered the written change of the contract, which appears thereon, and which was by direction of said Ridgway copied on the exhibit filed with petition as Washer's copy thereof, and that said Carpenter, county judge, knew and approved of the said contract and change thereof made.

Plaintiffs then read in evidence to the jury said contract sued on and change thereof and said copy of said contract and change thereof kept by said Ridgeway; which contract sued on and change thereof is as follows:

Contract Sued on.

This contract, made and entered into between the county of Bullitt, in the State of Kentucky, by J. W. Ridgway, com'r, on her behalf, of the first part, and W. T. Washer, of Perry county, Ind., of the second part, witnesseth:

That the first party has this day contracted with the second party to erect an arched stone bridge across Pond creek at the Brawner
108 foundation site, which said creek is the dividing line between the countyes of Bullitt & Jefferson, said bridge to be built according to the following specifications: The arch with 25 feet span, semicircular in form, with radius of 12.6; the *sheeting* to be on both beds, & joints to be cut according to circle, as shown on plan signed by W. T. Washer, which is made part thereof; the foundation to be 24 feet wide and 10 feet deep, and to be built six feet high for arch to spring on; the wing stones to have a draft round the face 1 inch wide; headers to be not less than 1.8 long, and stre-chers not less than 3 feet; to be all well bounded together, and headers and stretchers so distributed in the wall as to make a good bond—at least 1 header to every 10 feet of wall—and so arrainged that the headers on the next above will be placed between the twoo headers in the course below; all the walls in the wings to batter 1 inch per foot in height, the wing wall to be 6 feet wide and carried up to
109 the height of 24 feet, then the parapett wall to commence at a line with the top of bridge floor to the height of 3.6, with coping cap as shown in said plan.

The second partey is to keep the fill made as the masonry is being built, so that it will become solid between the walls; the mortar to be twoo parts clean, sharp sand and one of cement; the courses to be all well bedded in mortar; all break joints to be at least one foot in length; the bridge to be good and substantial and the work done in a workmanlike manner, to be accepted by the party of the first part, by the commissioners aforesaid; and the second party agrees to build said bridge according to the foregoing specifications at the following rates, which the first party agrees to give when said work is completed and accepted, viz: For masonry, five dollars and 30c. per cubic yard, including cleaning of the ground, &c.; for fill- in the embankment, 17¾ cents per cubic yard; and the party of
110 the second part, with Jacob Daunhauer and Peter Backer, his surety-, covenants to and with the first party in the penal

sum of five thousand dollars for any loss or damage the first party may sustain by reason of any fault or failure on the part of the second party to perform the covenants and contract herein expressed.

It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party guarantees the payment of the whole work to the second party.

Witness our hands this 8th day of July, 1878, as commissioners of Bullitt Co., Kentucky.

J. W. RIDGWAY.
JAMES HORINE.

Change of Contract.

It is agreed that a change shall be made in the above specifications as follows, to wit: All reference in the above specification to stone-work shall read stone abutments on the same foundation & the same kind and character of masonry; the abutments shall
111 be 26 feet high, and a wrought-iron truss bridge on said abutments, according to the specifications, plan, & *stran* sheets filed herewith as part hereof, at the price of ten dollars per foot.

(Signed by) J. W. RIDGWAY.
W. T. WASHER.

TROY, IND., *August the* 29, 1878.

I hereby transfer the within contract, together with all mon-ys and profit due or to become due on the same, to Jacob Daunhauer and Peter Backe, to be held by and belong to them until all notes endorsed by them for me are fully paid and satisfied.

W. T. WASHER.

Contract & Change Kept by Ridgway.

The copy of said contract and change thereof kept by said Ridgway is as follows:

This contract, made and entered into between the county of Bullitt, in the State of Kentucky, by J. M. Ridgway, com'r, on behalf of the first party, and W. T. Washer, of Perry county, Indiana, of the second part, witnesseth:

That the first party has this day contracted with the sec-
112 ond party to erect an arched bridge across Pond creek at the Brawner foundation site, which said creek is the dividing line between the counties of Bullitt & Jefferson, said bridge to be built according to the following specifications:

The arch with 25-feet span, semicircular in form, with radius of 12.6, the *sheeting* to be on both beds, and joints to be cut according to circle (as shown on plan signed by W. T. Washer, which is made part hereof), the foundation to be 24 feet wide and 10 feet deep, & to be built 6 feet high for arch to spring on; the wing stones to have a draft round the face 1 inch wide; headers to be not less than

1.8 long and streachers not less than 3 feet; to be all well bonded together, and headers and streachers so distributed in the wall as to make a good bond—at least 1 header to every 10 feet of wall—and so arranged that the header on the course next above will be placed between the two headers in the course below; all the walls in the wings to batter 1 inch per foot in height; the wing walls to
113 be 6 feet wide and carried up to the height 24 feet, then the parapett wall to commence at a line with the top of bridge floor to the height of 3.6, with coping cap as shown on said plan.

The second party is to keep the fill made as the masonry is being built, so that it will become solid between the walls; the mortar to be two parts clean, sharp sand and one of cement; the courses to be all well bedded in mortar; all break joints to be at least one foot in length; the bridge to be good and substantial and the work done in a workmanlike manner, to be accepted by the party of the first part, by her commissioner aforesaid.

An the second party agrees to build said bridge according to the foregoing specifications at the following rates, which the first party agrees to give when said work is completed and accepted, viz:

For masonry, five dollars & 30 cents per cubic yard, including cleaning of the ground, &c.; for fill- in the embankment, 17¾ cents per cubic yard.

And the party of the second part, with Jacob Daunhauer
114 and Peter Backer, his surety-, covenants to and with the first party in the penal sum of five thousand dollars for any loss or damage the first party may sustain by reason of any fault or failure on the part of the second part- to perform the covenants & contract herein expressed.

It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party guarantees the payment of the whole work to the second party.

Witness our hands this 8th day of July, 1878.

W. T. WASHER. [SEAL.]
JACOB DAUNHAUER. [SEAL.]
PETER BACKER. [SEAL.]

STATE OF INDIANA, }
Perry County, } ss:

I, John T. Patrick, clerk of the circuit court within and for the county of Perry and State of Indiana, do hereby certify that the above and foregoing bond in the sum of five thousand dollars would be sufficient in this county with the foregoing security.

In witness whereof I have hereunto set my hand and the
115 seal of said court, at Cannelton, Ind., this 8th day of July, A. D. 1878.

[SEAL.] JNO. T. PATRICK, *Clerk,*
Per C. F. M., *Deputy.*

It is agreed that a change shall be made in the above specification as follows, to wit:

Change on Copy of Contract Kept by Ridgway.

All reference in the above specifications to stone arches shall read stone abutments on the same foundations & the same kind and character of masonry; the abutments shall be 26 feet high, & an wrought-iron truss bridge on said abutments, according to the specifications, plan of "strain sheet" filed herewith as part hereof at the price of ten dollars per foot.

J. W. RIDGWAY.
W. T. WASHER.

Bill of Exceptions Continued.

Plaintiffs also offered to introduce parole evidence tending to show that Carpenter, county judge, sent to plaintiff- on its date Exhibit "C," filed with petition, and at the same time sent to said
116 Commissioner Ridgway the letter of the same date, hereinafter set forth, and that said Ridgway exhibited that letter to plaintiffs and, in pursuance of its directions, ordered plaintiffs to cease work on said bridge, and in obedience to said notice, Exhibit C, and said letter to Ridgway, commissioner, and his said orders, plaintiffs ceased work upon said bridge.

And plaintiffs then read in evidence to the jury said Exhibit C (which has heretofore been copied in this record, see page 17) and said letter to Ridgway; which letter is as follows, to wit:

Letter to Ridgeway.

SHEPHERDSVILLE, 10*th December*, 1878.

James W. Ridgway, Esq.

DEAR SIR: After consulting *of* Judge Muir & others i- becomes necessary that the work on the bridge over Pond creek be stopped at present, as Bullitt county will have to take steps to have Jefferson county to do their part of the work. Bullitt is perfectly willing to pay her part for the erection of the bridge, but will not pay for Jefferson county's part. If we should finish the bridge we
117 could not then perhaps compell Jefferson to pay, but without a bridge Jefferson will be compelled to do her part; and, with this much work at the present site, I think no set of commissioners could or would change the site. Judge W. R. Thompson is of opinion that we can hold Jefferson on the old Brawner contract; at any rate, we will try it. You will say to Mr. Washer to stop work at present and until further notified. Notice will be served on Mr. Washer to-day or to-morrow to quit work, & if he works he will look to Jefferson for his pay.

Yours, &c., W. CARPENTER.

Bill of Exceptions Continued.

That defendant at the time objected to the said parole evidence going to the jury and each part thereof, and to the reading in

evidence said contract and duplicate thereof, and to said Exhibit C and said letter; but the court overruled said objections and permitted said evidence to go to the jury; to which action of the court in each instance defendant at the time excepted; that at the
118 conclusion of the evidence defendants moved the court to instruct the jury that plaintiffs could only recover of defendant for building said bridge Bullitt county's share, calculated in the proportion of her tithables to the sum of the tithables of Jefferson and Bullitt counties; that Bullitt county had no power to contract for the whole cost of building the bridge nor for any more than said proportion thereof; to which plaintiffs objected, and the court refused to so instruct the jury; to which defendant at the time excepted.

And this bill of exceptions is now signed and made a part of the record in this action.

JNO. W. BARR, *Judge.*

DISTRICT OF KENTUCKY:

I, Sam'l B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing one hundred and seventeen pages contain a true
119 and correct transcript of the record and proceedings had in the court in the case mentioned in the caption hereof.

Witness my hand and seal this 22d day of September, 1885.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Fee for transcript, $36.50.

120 UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between W. T. Washer, Jacob Danenhauer, and Peter Baecker, plaintiffs, and Bullitt County, defendant, a manifest error hath happened, to the great damage of the said Bullitt County, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Louisville, in said district, this sixth day of October, A. D. 1885, and of the Independence of the United States the 110th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
C. C. C., K. D.

Allowed by—
JNO. W. BARR.

121 Know all men by these presents, that we, F. P. Straus, James F. Smith, are held and firmly bound unto W. T. Washer, Jacob Danenhauer, and Peter Baecker, plaintiffs in the action hereinafter named, in the just and full sum of three hundred dollars, $300.00, to be paid to the said Washer, Danenhauer, and Baecker, their executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly & severally, by these presents.

Sealed with our seals this 7th day of October, 1885.

Whereas lately at a court, in the circuit court of the United States for the 6th circuit and Kentucky district, in a suit depending in said court between said Washer, Danenhauer, and Baecker and The County of Bullitt, and judgment was rendered against said County of Bullitt, and said county having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment in the aforesaid suit, and a citation directing said Washer, Danenhauer, and Baecker to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October, 1885:

122 Now, the above obligation is such that if the said Bullitt County shall prosecute said writ of error to effect and answer all costs if the said county fail to make its plea good, then this obligation to be void; otherwise to remain in full force and effect.

F. P. STRAUS.
JAMES F. SMITH.

Sealed and delivered in presence of—
E. W. HALL.
D. M. RODMAN.

STATE OF KENTUCKY, }
Bullitt County, } *sct:*

I, E. W. Hall, clerk of the Bullitt county court, in the State of Kentucky, certify that F. P. Straus and James F. Smith signed and acknowledged the foregoing bond in my presence to be their act and deed; and I further certify that said F. P. Straus and James F. Smith are good for the amount named herein.

Witness my hand and seal of office this the 7th day October, 1885.

E. W. HALL,
Clerk Bullitt Co. C't.

Approved October 8th, 1885.

JNO. W. BARR,
Judge U. S. Dist. Court, Ky. Dist.

123 A true copy.
Witness my hand and seal this 8th day of October, 1885.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk.*

124 UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

To W. T. Washer, Jacob Danenhauer, and Peter Baecker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the 12th day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein Bullitt County is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this — day of October, in the year of our Lord 1885, and of our Independence the 110th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JNO. W. BARR, *Judge.*

125 [Endorsed:] W. T. Washer *et al. vs.* Bullitt County. Citation.

Executed October 8th, 1885, by delivering to A. E. Willson, the attorney of record of the defendants in error, a true copy of the within citation.

D. M. RODMAN.

A. E. WILLSON,
Att'y for Def'ts in Error.

D. M. Rodman says that he executed the within citation by delivering to A. E. Willson, the attorney of record of the defendants in error, a true copy thereof.

D. M. RODMAN.

Subscribed and sworn to before me by D. M. Rodman this 8th day of October, 1885.

HENRY F. CASSIN,
Com'r Cir. C't U. S., Ky. Dist.

126 *Assignment of Errors.*

Supreme Court of the United States. October Term, 1885.

BULLITT COUNTY, Plaintiff in Error,
against
W. T. WASHER, JACOB DANENHAUER, and PETER BAECKER, Defendants in Error.

And now comes the plaintiff in error, The County of Bullitt, by James Speed and D. M. Rodman, its counsel, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in matter of law in its order of March 9th, 1885, in allowing the defendant- in error to file the second amended petition. Record, page 85.

Second. That the court erred in matter of law in overruling the motion for a new trial made by the plaintiff in error (see Record, page 103), and in lieu thereof the said court should have sustained said motion, set aside the said verdict, and granted a new trial.

Third. That the said circuit court erred in matter of law in allowing the defendant- in error to read to the jury the alleged contract sued on (Record, p. 107), duplicate or copy thereof
127 (Record, p. 111), and the change or alteration appended to said alleged contract (Record, p. 110), to which plaintiff in error at the time excepted, and in lieu thereof the said court should have excluded said papers and every one of them from the jury.

Fourth. The court erred in matter of law in allowing the paper marked Exhibit "C" (Record, p. 17), being letter dated December 10th, 1878, and signed "W. Carpenter, P. J., B. C. C.," and "F. P. Straus, county attorney," to be read to the jury, to which exception was taken at the time, and in lieu thereof said letter should have been excluded from the jury.

Fifth. The court erred in matter of law in allowing the letter from W. Carpenter to James W. Ridgeway, dated Shepherdsville, Ky., December 10th, 1878 (Record, p. 116), to be read to the jury, to which exception was taken at the time, and in lieu thereof said letter should have been excluded.

Sixth. The court erred in allowing the following parole evidence to go to the jury, to wit:

That in pursuance of said orders of July 16th, 1877, and November 19th, 1877, J. W. Ridgeway, the commissioner named in those orders, reported to W. Carpenter, county judge named in
128 said orders, plans and specifications and bids for constructing the bridge named in said orders, and the amount of each of said bids, and, among others, the bid of plaintiff Washer, and that said W. Carpenter, county judge, received said plans, specifications, and bids, and accepted said bid of said plaintiff Washer; that said Ridgeway, commissioner, by the direction of said Carpenter,

county judge, then executed and delivered to plaintiff Washer the contract sued on, conforming to said bid, and plaintiff signed and delivered to said Ridgeway, commissioner, a copy thereof, which said Ridgeway kept in his possession; and plaintiff Washer and said Ridgeway, said Ridgeway acting by the direction of said W. Carpenter, county judge, executed and delivered the written change of the contract which appears thereon, and which was, by direction of said Ridgeway, copied on the exhibit filed with the petition as Washer's copy thereof, and that said Carpenter, county judge, knew and approved of the said contract and change thereof made (see Record, pp. 106–'7); to each and every part of which exception was taken at the time, and in lieu thereof the court should have excluded each and every part of said parol evidence.

129 Seventh. The court erred in matter of law in refusing to instruct the jury, as asked by plaintiff in error, in this, to wit, the said circuit court refused to instruct the jury that the Bullitt county court could only act by its record, & that its record showing that it intended and authorized joint action with the Jefferson county court there could be no recovery for defendant- in error unless Jefferson county was also bound for its proportionate share; that defendant- in error could in any event only recover for building said bridge Bullitt county's share calculated in the proportion of her tithables to the sum of the tithables of Jefferson and Bullitt counties, and that Bullitt county having already paid more than her proportion the jury must find for the defendant, the county, and in lieu thereof said circuit court should have instructed the jury as requested, that the Bullitt county court had no power to contract except jointly; that its record contemplated joint action only, and that the jury

130 should have been instructed to find for the county.

And the said Bullitt County, plaintiff in error, prays that the said judgment of the circuit court be reversed and held for naught; that the case be remanded with directions to award the plaintiff in error a new trial; that it be restored to all things which it has lost by reason of said judgment and for all such further relief as may seem proper.

JAMES SPEED &
D. M. RODMAN,
Attorney- for Plaintiff in Error.

Endorsed on cover: Kentucky C. C. U. S. No. 132. Bullitt County, plaintiff in error, *vs.* W. T. Washer, Jacob Danenhauer, and Peter Baecker. Filed October 16, 1885.